Office of Chief Counsel
Internal Revenue Service
Memorandum

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to: Associate Area Counsel (Boston)
(Large & Mid-Size Business)
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from: Nancy Galib
Senior Technician Reviewer, Branch 4
(Procedure & Administration)

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subject: Refund Claims

This Chief Counsel Advice responds to your request for assistance. This advice may not be used or cited as precedent.

LEGEND

Taxpayer = .

A =

B =

C =

D =

E =

F =

Agreement =

Filing 1 =

Filing 2 =

Service Center 1 =

Service Center 2 =

Street Address =

Year 1 =

Year 2 =

Year 3 =

Year 6 =

Year 7 =

Year 10 =

Year 11 =

Year 13 =

Year 14 =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

Date 6 =

Date 7 =

Date 8 =

Date 9 =

Date 10 =

Date 11 =

Date 12 =

V$ =

W$ =

X$ =

Y$ =

Z$ =

ISSUES

Whether Form 1120X filings in Year 10 constituted “informal” refund claims for the Taxpayer.

CONCLUSIONS

For the reasons stated below, we conclude that these filings should be treated as informal refund claims for the Taxpayer for tax Years 1-3. Therefore, we recommend that the Service accept Taxpayer’s argument that it sought refunds for those years before the refund claim statute of limitations expired.

FACTS

The Taxpayer executed an agreement on Date 1 to sell certain of its assets to an unrelated corporation. The agreement excluded from the sale “all claims for refunds of any Taxes for all periods ending on or prior to the Closing Date.” The Taxpayer filed a voluntary petition for bankruptcy under Chapter 11 on Date 2. The Bankruptcy Court entered an order on Date 3 directing the joint administration of the Taxpayer and a subsidiary.

The plan that the Taxpayer entered into under Chapter 11 on Date 4 provided that the “…Litigation Trustee … shall be the exclusive trustee of the assets of the Litigation Trust for purposes of 31 U.S.C. 3713(b).” The plan further provided that one of the Litigation Trustee’s duties was to “comply with all applicable laws and regulations concerning the

matters set forth herein including the filing of applicable tax returns." On Date 5 the Bankruptcy Court selected E as Litigation Trustee.

In his capacity as Litigation Trustee, E on Date 6 entered into the Agreement. A proposed to find unrealized "specified assets" (i.e., "Federal income tax refunds of approximately $V) for the Litigation Trust in exchange for an economic interest in those assets. On Date 6, the Litigation Trust transferred an economic interest in the "specified assets" to A. The Agreement stated that A "shall be permitted to collect upon the Economic Interest conveyed."

The Agreement describes the tax refund as generated by net operating loss carrybacks from tax Year 6 to tax Years 1-3, and further provides as follows:

> Taxpayer must also file its Year 6 tax return by Date 7 to establish its NOL, and the right to file the refund claim. Such return can be estimated and adjusted later when more time and information is available…. We suggest that an estimated tax return be filed by Date 7 which will establish a net operating loss. We believe that it is fairly obvious and indisputable that Taxpayer incurred a substantial NOL for Year 6. We also suggest that a refund claim be filed by Date 7 carrying back such loss to the years identified above. Such claim can be a "protective claim" in which it protects Taxpayer from the statute expiring until more detailed information is available.

On Date 7, amended returns on Form 1120X (Filing 1) were filed with Service Center 1 for the Taxpayer's Year 1-3 taxable years. Filing 1 claimed overpayments for Years 1-3 based on an NOL carryback from Year 6, and claimed the following refunds: W for Year 1, $X for Year 2 and $Y for Year 3.

Filing 1 was filed in the Taxpayer's name and with its EIN, but was signed by B, who listed his title on Filing 1 as F. B was an officer of A. Nothing suggests that B held the kind of office with the Taxpayer that would entitle him, under I.R.C. § 6061 or § 6062 or the accompanying regulations, to sign returns for the Taxpayer. Filing 1 included Form 8822 (Change of Address) to change the address to that of C, an attorney who represented A but who apparently lacked a valid power of attorney entitling him to act for the Taxpayer regarding federal tax matters.

Also filed on Date 7 with Service Center 1 was a return in the Taxpayer's name on Form 1120 for the tax Year 6. The return claimed a NOL of $Z for the year. Although this return showed the Taxpayer's name and EIN, it listed the address for the taxpayer as that of C, with a "c/o" reference preceding that address. The return (the "Year 6 return") was signed by B, with the same title shown on the 1120X filings, i.e., "F." An unsigned, undated copy of the Year 6 return was attached to each of the 1120X filings.

After B requested an update in Year 10 from Service Center 1 regarding the refund requests, the Service responded via a letter dated Date 8. The Service advised B,

among other things, that refund claims must be filed "by the 'taxpayer'" and said that the Taxpayer "has no claim that requires consideration." The Service and purported representatives of the taxpayer, some of whom apparently lacked an effective power of attorney, exchanged correspondence following the Service's Date 8 letter. The Taxpayer representatives argued that E's powers as Litigation Trustee entitled him to empower A to sign returns, and that the Agreement conveyed that signing authority to A. The Service responded with letters citing I.R.C. §§ 6012 and 6402, among others, to argue that A and B lacked any entitlement to seek tax refunds for the Taxpayer.

On Date 10, E filed a revised Year 6 income tax return for the Taxpayer with Service Center 2 (the "Year 11 revision"). He signed the Year 11 revision on Date 9. Apparently, the only changes from the Year 6 return were as follows:

- E signed the Year 11 revision, as "Litigation Trustee";
- E placed the words "As of Date 6" above the title line in the signature block;
- a bankruptcy Disclosure Statement attached to the Year 6 return was missing from the Year 11 revision;
- the name and address box on the Year 11 revision showed "Taxpayer & Subsidiary c/o E, Litigation Tr., at Street Address;" and
- the Year 11 revision listed a different date for the Taxpayer's incorporation than the Year 6 return.

Also on Date 10, E submitted Filing 2 for the Taxpayer with Service Center 2 for Years 1-3 showing the same refund claims shown on Filing 1. E signed Filing 2 on Date 9, listing his title as "Litigation Trustee", and added the words "signed as of Date 6" above the title line in the signature block. Attached to Filing 2 were the following items missing from Filing 1: the Date 5 Bankruptcy Court order designating E as Litigation Trustee, and a "Litigation Trust Agreement" between Taxpayer and E. This trust agreement, among other things, transferred to E, as litigation trustee, certain causes of action held by the debtors. The bankruptcy disclosure statement attached to Filing 1 was not submitted with the Filing 2, and neither was a copy of the Year 6 return. A letter to the Service dated Date 10 from D describes in detail the reason for the submission of the Year 11 revision and Filing 2, namely the wish to correct any flaws in the Year 6 return and Filing 1. The letter portrays the Year 11 revision and Filing 2 as perfecting the Year 1-3 refund claims set forth in Filing 1.

The Service, via a letter dated Date 11, disallowed the Year 1-3 refund claims, and the Taxpayer has protested this disallowance to Appeals. The disallowance asserts the following grounds for rejecting the refund claims:

- improper signature on Filing 1, as the Litigation Trustee (E) did not sign; and

- under I.R.C. § 172, a NOL for Year 6 was not "ascertainable" until a valid return was filed for that year on Date 10, and by then the refund statute of limitations for Years 1-3 had expired.

LAW AND ANALYSIS

Statute of Limitation

For purposes of this memorandum, we assume that Filing 1 was timely under the applicable refund claim statute of limitations. This assumption will allow consideration of whether Filing 1 constituted a valid formal or informal refund claim or whether its flaws – including lack of a proper signature – disqualify it.

Filing 1 as "Informal" Refund Claim

The relevant case law supports the argument that Filing 1 qualified as an informal refund claim. The Supreme Court has held that a notice fairly advising the Service of the nature of the taxpayer's claim, which the Service could reject because it did not comply with the formal requirements of the regulations, will nevertheless be treated as a claim where the formal defects are remedied by amendment after the lapse of the statutory period. *United States v. Kales*, 314 U.S. 186 (1941). There are no rigid guidelines except that an informal claim must have a written component and "should adequately apprise the Internal Revenue Service that a refund is sought and for certain years." *Arch Engineering Co., Inc. v. United States*, 783 F.2d 190, 192 (Fed. Cir. 1986).

Filing 1 identified the theory and nature of the refund claim (NOL carrybacks generating prior year overpayments), specified the years involved (carryback from Year 6 producing Year 1-3 overpayments) and quantified the claims ($W for Year 1, $X for Year 2 and $Y for Year 3). In light of the case law cited above on informal claims and many other cases with similar language, it is difficult to see any respect in which Filing 1 failed to qualify as an informal claim.

Although the files indicate a number of potential documentation issues regarding the claims set forth in Filing 1, the claim disallowance did not rely on these matters as grounds for labeling Filing 1 a defective refund claim.

Date 7 "Existence" of NOLs for Informal Claim Purposes

In light of *Kales*, *Arch Engineering* and similar case law, the flawed signature on the Year 6 return would not render the asserted NOL carrybacks "non-existent" for purposes of determining whether Taxpayer filed an informal claim on Date 7. As noted above, Filing 1 quantified the refunds, identified the relevant years and stated the basis

for the claims. The signature flaw is what made the claims "informal" instead of "formal", but it did nothing to prevent the Service from understanding what Filing 1 was about, i.e., the asserted carrybacks from Year 6. *See*, *e.g.*, *American Standard Radiator and Sanitary Corp. v. United States*, 318 F.2d 915, 920 (Ct. Cl. 1963) (informal claims must contain (1) a written component; (2) some demand for refund; and (3) "sufficient information as to the tax and the year to enable the Internal Revenue Service to commence, if it wishes, an examination into the claim.").

Revenue Ruling 75-327, 1975-2 C.B. 481, does not support the argument that the NOL did not exist or could not be "ascertained" on Date 7. This revenue ruling concluded that a Form 1120 marked "tentative" does not constitute a return for purposes of processing a Form 1139 ("Corporation Application for Tentative Refund"). The present situation does not involve an application for tentative refund, and Rev. Rul. 75-327 is therefore inapplicable by its terms. Moreover, Treas. Reg. §1.6411-1(b)(2) states that applications for tentative carryback adjustments (the subject of Rev. Rul. 75-327) do not constitute refund claims, whereas the issue in the present case involves whether Filing 1 did qualify as a refund claim.

In addition, Non-Docketed Service Advice Review (1997 IRS NSAR 5503) does not support the view that the NOL was non-ascertainable as of Date 7. This NSAR concludes that an improperly signed return undercut a taxpayer's claimed entitlement to NOL carrybacks. The NSAR does not consider, however, the potential applicability of case law on informal claims.

Filer of Filing 1

A question has been raised concerning the status of the filers of Filing 1 – i.e., A or B – and whether the fact that the Taxpayer did not file Filing 1 is fatal to the purported status of that filing as a refund claim. In light of the Agreement and the "specified asset" attachment thereto, however, the Taxpayer (as represented by E) surely contemplated that A would be pursuing tax refunds in the Taxpayer's name. In light of this knowledge and the fact that Filing 1 and the Year 6 return were in the Taxpayer's name, Filing 1 should not be viewed as something other than an act by the Taxpayer. As noted above, Filing 1 identified in detail refunds to which the Taxpayer was allegedly entitled. This knowledge by the Taxpayer does not justify the decision by B to sign the returns. As noted above, the applicable statutes and regulations indicate B was not the appropriate person to sign Filing 1 or the Year 6 return. But these signature problems are the flaw that rendered Filing 1 an "informal" claim, not proof that an "unrelated third party" as opposed to the Taxpayer itself, was seeking a refund.

Subsequent "Perfection" of Filing 1

An argument has been raised that the Taxpayer failed to meet the obligation in *Kales* and similar cases to "perfect" the purported Filing 1 informal claim. This view seems unjustified. As noted above, the grounds on which the Service found Filing 1 to be

legally defective as refund claims were as follows: improper signatures on those filings and on the Year 6 return. These flaws have been described as leading to consequences such as the NOL not being "ascertainable" as of Date 7. The signature flaws were corrected, however, via E's submission of Filing 2 and the Year 11 revision. Therefore, there appear to be no grounds for arguing that E's actions failed to "perfect" the earlier, flawed claims.

Filing 2 was virtually identical to Filing 1 except for the corrected signatures, and thus reiterated the theory (NOL carrybacks from Year 6) of Filing 1. The dollar amounts in Filing 2 were identical to those in Filing 1.

"Variance" Rule

The "substantial variance rule" forbidding a taxpayer from litigating refund claim matters the taxpayer failed to raise before the Service should not be viewed as adversely affecting the Taxpayer in the present case. The Date 10 actions by E (which were still in the context of pre-disallowance administrative proceedings before the Service) corrected the flaws which rendered Filing 1 "informal" and thus accomplished the necessary claim perfection, but made no changes in the Taxpayer's underlying theory for refund entitlement. That theory, in Filing 2 as in Filing 1, was that a quantified NOL carryback from Year 6 generated Year 1-3 refunds.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

The Taxpayer contends that the refund claims filed on Date 7 "should be approved". The Service will have to decide that matter, based on its review and analysis of the claimed NOL carryback. We are recommending in this memorandum only that the Date 7 refund claims be considered on their merits, instead of being rejected for their signature-related flaws.

Please call (202) 622-3630 if you have any further questions.