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From:
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To:
Cc:
Subject: [ ]

At the request of Lead Case Advocate , the Associate Area Counsel ( ), , provided an advisory opinion as to the proper allocation of a remittance which accompanied an Application for Automatic Extension of Time to File U.S. Individual Income Tax Return (Form 4868) submitted by the above taxpayer and his wife in regard to their income tax liability. That Form contained the names of both the taxpayer and his wife, as well as their respective Social Security Numbers. The Internal Revenue Service treated the remittance which accompanied the Form 4868 as a payment of estimated tax, and allocated it between the accounts of the taxpayer and his wife in accordance with Treas. Reg. Section 1.6654-2(e)(5)(ii)(B). From through , the taxpayer and his wife filed separate income tax returns, with a filing status of "married, filling separately." They are now apparently involved in a divorce proceeding.

Upon learning of the above-described allocation of funds, the taxpayer's authorized representative (a CPA) informed Service personnel that the funds in question were entirely those of the taxpayer, and that the allocation of a portion of the remittance which accompanied the Form 4868 to the taxpayer's spouse' account was incorrect. The taxpayer's representative, therefore, demanded that those funds which had been posted to the taxpayer's spouse' account be transferred to the taxpayer's account. That action was thereafter taken by Service personnel. Upon learning of that transfer, the taxpayer's spouse demanded that the funds be returned to her account; and they were. The taxpayer then remitted an amount equal to the funds which had been transferred to his wife's account, and now seeks a refund of that amount.

In her advisory opinion, the Associate Area Counsel concluded that the funds which accompanied the subject Form 4868 were properly treated as a payment of estimated tax that should be allocated pursuant to the provisions of Treas. Reg. Section 1.6654-2(e)(5)(ii)(B) and IRM 21.6.3.4.2.3.3. In the event no agreement can be reached between married taxpayers as to the proper allocation of a payment made with a Form 4868, the IRM direct that the payment is to be allocated between the married taxpayers' accounts based on a ratio which takes into consideration each separate spouse' individual income tax liability. Because of the pending divorce, the taxpayer and his spouse could not agree on a proper allocation of the funds in question; and the Associate Area Counsel concluded that the allocation of the subject payment between the accounts of the taxpayer and his spouse was proper and supported by case law, regulations and the IRM. This is consistent with Treas. Reg. Section 1.6654-2(e)(5)(ii)(B).

The taxpayer's CPA does not agree with the opinion of the Associate Area Counsel ( ) In a letter to your office, the CPA argued that because the funds in question were the sole property of the taxpayer, the allocation that took place was wrong, and that the case of United States v. MacPhail, 2003-2 USTC P 50 (S.D. Ohio 2003) requires that the portion of the funds allocated to

the taxpayer's spouse be returned to the taxpayer. The CPA's letter also indicated that the case of Hathaway v. United States, 71 AFTR 2d 1786 (W.D. Wash. 1993), also supported his position. Upon receipt of the CPA's letter, you sought the assistance of this office.

The Associate Area Counsel's advisory opinion did not address either MacPhail or Hathaway. For that reason, we suggested that this matter should be coordinated with the Office of the Associate Chief Counsel ( ). That coordination did take place, and it has been determined that the position taken by the Associate Area Counsel in her initial advisory opinion was correct. Accordingly, we suggest that you respond to the taxpayer's CPA as follows.

The proper method for apportioning the funds in dispute depends on whether the remittance submitted with the Form 4868 is to be treated as a joint estimated tax payment, or an overpayment. In both MacPhail and Hathaway, the District Courts founds the funds in question to be "overpayments," and determined that the proper allocation was based on which of the married taxpayers in those cases had been the owner/source of the funds. Hathaway is clearly distinguishable from the situation at hand, however, because the funds there in question did not involve a remittance with a Form 4868. Moreover, what the CPA's letter fails to mention is that while the District Court's opinion in MacPhail was affirmed on appeal, in doing so, the United States Court of Appeals stated "[w]hile we agree with the district judge's conclusion, we do not agree with his reasoning." United States v. MacPhail, 149 Fed. Apxx. 449, 452 (6th Cir. 2005).

As the appellate court noted in MacPhail, "under [section 6407 of the Internal Revenue Code], an overpayment credit does not exist until the IRS authorizes the refund or credit. The simple act of sending in [a] check…does not call into existence a tax overpayment." 149 Fed. Appx. At 453. This supports the position taken by the Associate Area Counsel in her advisory opinion that the funds here in question (i.e., those remitted with the Form 4868) were properly treated as a payment of estimated tax -as opposed to an "overpayment" - to be allocated between the taxpayer and his spouse pursuant to the relevant provisions of the estimated tax regulations and the IRM. Further support for that conclusion is found in Gabelman v. Commissioner, 86 F.3d 609 (6th Cir. 1996), another opinion issued by the United States Court of Appeals for the Sixth Circuit. In Gabelman, the Court of Appeals held that "remittances submitted with Form 4868 extension requests are payments [of tax] as a matter of law." 86 F.3d at 10 (emphasis added). Accordingly, the allocation of the payment which accompanied the Form 4868 was correct.

I am closing our file. If we may be of further assistance, do not hesitate to contact us.