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From:
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To:
Cc:
Subject: CCA

This email is in response to your questions about a taxpayer who received an overpayment from her employer's qualified plan in . The overpayment (herein referred to as $X) was in addition to a lump sum payment to which the taxpayer was entitled. The taxpayer was provided an erroneous Form 1099-R and in good faith believed that the entire distribution was an eligible rollover distribution. Based on that erroneous information, the taxpayer rolled over the entire distribution into an individual retirement account (IRA) in . The taxpayer excluded the $X from her gross income on her Form 1040 for based on the same erroneous information that the $X was an eligible rollover distribution. Then, in , her former employer informed her of the error, and she withdrew the $X from her IRA in . The taxpayer was age 60 when she withdrew the $X.

First you ask whether the $X was taxable in . In general, § 402(a) provides that any amount actually distributed to a distributee from a qualified plan described in § 401(a) will be taxable to the distributee in the taxable year of distribution under § 72 (relating to annuities). Section 402(a) applies to any distribution from a qualified plan, even an overpayment. See Rev. Rul. 2002-84, 2002-50 I.R.B. 953. Section 402(c)(1) provides that an eligible rollover distribution that is rolled over to an eligible retirement plan is not includible in gross income for the taxable year in which paid. However, both the operative language of § 402(c)(1) and the definition of eligible rollover distribution in § 402(c)(4) limit the applicability of the exclusion for rollovers to distributions of "any portion of the balance to the credit of an employee in a qualified trust." Contrary to the information the taxpayer was provided, the $X exceeded her balance in the qualified trust and was not eligible for the exclusion in § 402(c)(1). Based on the corrected information, she should have treated the $X as taxable under § 72 in .

Next you ask whether the distribution of the overpayment from the taxpayer's IRA was taxable in . Section 408(d)(1) provides that, except as otherwise provided, "any amount paid or distributed out of an individual retirement plan shall be included in gross income by the payee or distributee, as the case may be, in the manner provided under section 72." Thus, unless an exception applies, the amount distributed in would be taxable to the taxpayer in that year. The taxpayer asserts that her distribution falls within an exception for distributions of excess rollover contributions under § 408(d)(5)(B). The exception in § 408(d)(5)(B) only applies if the taxpayer reasonably

relies on information supplied pursuant to subchapter F for determining the amount of the rollover, but the information was erroneous. The taxpayer asserts that she rolled the $X into her IRA based on information supplied on a Form 1099-R that stated that the amount of the overpayment was an eligible rollover distribution, but that she now knows the information was erroneous and, as a result, the $X distribution in is excludable under § 408(d)(5)(B). However, the "duty of consistency" precludes this result because it is contrary to the position she took on her return.

The duty of consistency is an affirmative defense that prevents a party, usually the taxpayer, from taking a tax position with respect to a tax year and then taking a contrary position in a subsequent year. As it applies to a taxpayer, the three elements of the duty of consistency are: (1) the taxpayer made a representation for tax purposes in one tax year; (2) the Commissioner acquiesces to the representation or relies on it; and (3) the taxpayer desires to change the representation in a later tax year after the statute of limitations bars an adjustment to the earlier year. Estate of Letts v. Commissioner, 109 T.C. 290 (1997), aff'd without published opinion, 212 F.3d 600 (11th Cir. 2000). See also Janis v. Commissioner, 461 F.3d 1080 (9th Cir. 2006); Estate of Ashman v. Commissioner, 231 F.3d 541 (9th Cir. 2000); and LeFever v. Commissioner, 100 F.3d 778 (10th Cir. 1996).

In this case, the taxpayer excluded the $X from her gross income in based on the position that the $X was an eligible rollover distribution. The Service relied on that information when it did not assess tax on the $X for . Now, new information has come to light that the $X was in fact not an eligible rollover distribution, and the taxpayer seeks to exclude the $X from her gross income in based on this new information. However, the duty of consistency prevents the taxpayer from basing her return on one set of facts (that the $X was an eligible rollover distribution) and basing her return on a different set of facts (that the $X was not an eligible rollover distribution). Even if the Service were to accept an amended return with the new information on it, the time period during which the Service could have assessed the tax on the $X for has expired, and the Service's reliance on the misinformation on the return cannot be undone. Accordingly, she is precluded from claiming the exception under § 408(d)(5)(B) on her return, and the distribution of the $X from her IRA was taxable under § 72 in .

Notably, the § 408(d)(5)(B) exception could have applied if the time period for assessing the tax on the $X for had not expired. In that case, after consistently applying the new information to both and , the overpayment would be included in her gross income for but not for .

Finally, you ask whether the taxpayer is liable for the 6% excise tax under § 4973 for the years through . Section 4973(a) imposes an excise tax equal to 6% of the amount of excess contributions in an IRA. In the case of an IRA, § 4973(b) defines excess contributions to be the sum of (1) the excess of the amount contributed for the taxable year to the account (other than a contribution to a Roth IRA or a rollover contribution described in section 402(c), 403(a)(4), 403(b)(8), 408(d)(3), or 457(e)(16))

over the amount allowable as a deduction under § 219, plus (2) the amount of excess contributions for the previous taxable year minus certain distributions and the amount allowable as a deduction under § 219 for the taxable year. In this case, the excise tax applies to the amount of the excess contribution in each year from through . Assuming that the taxpayer made no IRA contributions other than the ones described in your question, the excess contribution for was equal to the amount of the overpayment that the taxpayer contributed to the IRA minus the § 219 limit for . The excess contribution for was equal to the excess contribution for minus the § 219 limit for . Each year, the excess contribution is reduced by the § 219 limit for that year (less any IRA contributions actually made by the taxpayer in that year).

The taxpayer paid the excise taxes and is now seeking a refund. Note that the taxpayer may not assert the duty of consistency to generate a refund of these excise taxes. The duty of consistency is an affirmative defense against the party seeking to change its own prior representation. In this case, it is the taxpayer (not the Service) that is changing positions, and the inaccurate information provided in cannot be used to require the Service to refund the excise taxes.

We have not addressed any potential statute of limitations questions regarding the excise tax, nor have we raised any issues regarding corrections (and relief from the § 4973 excise tax) involving overpayments from qualified plans under the Employee Plans Compliance Resolution System (see Rev. Proc. 2008-50, 2008-35 I.R.B. 464).

This document may not be used or cited as precedent. Section 6110(k)(3) of the Internal Revenue Code.