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Memorandum

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to: Shelley Turner Van Doran
Area Counsel
(Tax Exempt & Government Entities)

from: Blaise G. Dusenberry
Senior Technical Reviewer
(Procedure & Administration)

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subject: Tribal General Welfare Exclusion Act refund questions

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

BACKGROUND

Congress enacted the Tribal General Welfare Exclusion Act of 2014 (Act)[1] in part to codify the IRS's June 2014 guidance on determining when payments from tribes to tribal members and their spouses and dependents will qualify as non-taxable payments under the general welfare exclusion.

Section 2(d) of the Act addresses the effective date of the Act and extends the statute of limitations for filing certain refund claims. You asked us to answer certain questions relating to claims and amounts available for credit or refund under the Act.

QUESTIONS

1. For what taxable years will claims for refund or credit be timely under the Act?
2. What is the scope of the Act's one-year waiver of the statute of limitations?
3. What payments may be reached by a claim for credit or refund under the Act?
4. How will a claim affect a year for which there is assessed but unpaid tax?
5. How will the 45-day interest rule apply?

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[1] P.L. 113-168, 128 Stat. 1884 (Sept. 26, 2014).

ANSWERS

1. Timely claims may be filed for any year with an open period for claiming a refund as of the date of enactment of the Act (September 26, 2014). Generally, this will include any return filed on or after September 26, 2011. This will include returns for tax years 2011 through 2014 and returns for earlier years that were filed late or on extension on or after September 26, 2011.
2. Claims that would have been timely on September 26, 2014, will be timely if made on or before September 26, 2015. Taxpayers should file as early as possible, however. See #3, below.
3. Payments made within two years of a refund claim may be credited or refunded; and for refund claims filed within three years of filing a return, payments made within three years of the date of the refund claim may be credited or refunded. When a taxpayer filed the return on extension and filed a refund claim within three years of the return filing date, payments made within three years of the date of the claim for refund, plus the length of any filing extension, may be refundable—generally 3.5 years.
4. Refund claims for periods for which the taxes have been assessed but not fully paid may be treated as informal requests for abatement. If the assessment is excessive because certain payments are non-taxable under the general welfare exclusion, the IRS may abate the excessive amounts.
5. When the IRS issues a refund within 45 days of a claim, no interest is allowable between the claim date and the refund date, but if the IRS does not issue the refund within 45 days, then interest must be paid from the date of the overpayment to a date not more than 30 days before the IRS pays the refund.

LAW AND ANALYSIS

Congress passed the Tribal General Welfare Exclusion Act of 2014 on September 26, 2014. Section 2(d) of the Act addresses the effective date and an extension of the refund statute of limitations in certain cases, as follows:

> (1) In general. The amendments made by this section shall apply to taxable years for which the period of limitation on refund or credit under section 6511 of the Internal Revenue Code of 1986 has not expired.
>
> (2) One-year waiver of statute of limitations. If the period of limitation on a credit or refund resulting from the amendments made by subsection (a) expires before the end of the 1-year period beginning on the date of the enactment of this Act, refund or credit of such overpayment (to the extent attributable to such amendments) may, nevertheless, be made or allowed if claim therefor is filed before the close of such 1-year period.

1. Taxable years and timely claims

To be timely, refund claims must be filed by the later of three years from the date a return was filed or two years from the date the tax was paid; or, in the absence of a return, within two years from the date the tax was paid. I.R.C. § 6651(a).

The Act applies to taxable years for which the time for filing a claim for refund has not expired, and we interpret that to mean had not expired on September 26, 2014, the date the Act was enacted. Act § 2(d)(1). For refund claims that would expire within one year after enactment, the Act provides that refund claims made during that one year period will be considered timely. Act § 2(d)(2).

a) Returns for tax years 2011 and later. Individual income tax returns are generally due on April 15, and returns filed before the due date are considered filed on the due date. I.R.C. § 6513(a). Three years before the September 26, 2014, enactment date of the Act is September 26, 2011. Timely-filed returns for tax year 2010 are considered filed on April 15, 2011, which is more than three years before the date of enactment. Because section 6511(a) requires taxpayers to file refund claims within three years of the date they filed their returns, the time for filing a refund claim for timely 2010 returns had already expired when the Act passed.

b) Returns for tax year 2010 filed on extension. Returns filed with an extension of time to file are due six months after the original filing due date. I.R.C. § 6081(a). For individual returns, the extended due date is October 15. Thus, 2010 returns filed on extension on or after September 26, 2011, were filed within three years of the date the Act passed, and refund claims for those returns will be timely if they are filed on or before September 26, 2015.[2] I.R.C. § 6501(a); Act § 2(d)(1) and (2).

c) Late-filed returns filed after September 26, 2011. Late returns for any year filed on or after September 26, 2011, were also filed within three years of enactment, and refund claims for those returns would also be timely if received on or before September 26, 2015. Id. Likewise, refund claims for payments made within two years of September 26, 2014 (i.e., payments made on or after September 26, 2012), will be timely if filed on or before September 26, 2015. Id.

[2] September 26, 2015, is a Saturday. Affected taxpayers will have until Monday, September 28, 2015, to file timely refund claims under the Act. See I.R.C. § 7503.

Summary of tax returns eligible for credit or refund

Generally:

a) Claims for refund for returns filed before September 26, 2011, are not timely and may be denied.[3]
b) Claims for refund for returns filed after September 26, 2012, are timely and should be evaluated and processed.
c) Payments made within two years of the refund claim date are refundable.

The challenging cases will have to be scrutinized carefully. For returns filed between September 26, 2011, and September 26, 2012, amounts paid within two years of the refund claim will be creditable or refundable (as always). Whether any other amounts may be refunded will turn on whether the claim were filed within three years of the date the taxpayer filed the return. If the claim is within three years of the return, then the look-back period for identifying payments that the IRS may credit or refund will be three years plus the period of any filing extension. I.R.C. § 6501(b)(2)(A). But if the claim is later than three years from the date of the return, then the look-back period would reach only those payments made within two years of the refund claim

2. Scope of Act's statute of limitations extension

In addition to providing a period of limitations that controls the timeliness of refund claims, the Code also imposes two limits on the allowance of credits and refunds. The first limit requires a timely claim for refund before the IRS may allow a credit or refund. *See* I.R.C. § 6511(b)(1) and Act § 2(d)(1) and (2). The second limit controls the amounts that may be credited or refunded; that is, limiting the payments from which the IRS may provide refunds or credits. I.R.C. § 6511(b)(2). The Act addresses the first limitation by extending the statute of limitation for filing a timely refund claim, but it does not address the second limitation that controls just which payments may be refundable on the date the taxpayer submits the claim. Therefore, claims that would have been timely on September 26, 2014, will be timely if filed on or before September 26, 2015; but because the Act did not also extend the payment limitations, there may be no payments from which the IRS may issue credits or refunds for claims that are timely only because of this extension.

3. Payments available for credit or refund

When a taxpayer files a refund claim within three years of filing a return, any payments made within three years of the date of the refund claim (plus the period of any

[3] Examples of situations that would change this result are: agreements extending the period of assessment pursuant to section 6501(c)(4), because those agreements extend the period for claiming a refund under section 6511(a) until six months after the end of the extended assessment period, I.R.C. § 6501(c); and cases where the taxpayer filed a timely refund claim and the IRS has not acted on the claim, because in such cases the refund period is tolled and the date of that timely claim will be used for looking back to determine which payments may be refunded or credited.

extensions of time to file the return) are available for refund or credit. I.R.C. § 6511(b)(2)(A). But when a taxpayer does not file a claim within three years of the date he filed the return, only those payments made during the two years before the refund claim may be refunded or credited. I.R.C. § 6511(b)(2)(B).

As a result, it is possible under the Act for a taxpayer to have a timely refund claim but for the IRS to have no payments that it may credit or refund.[4] This is particularly true when taxpayers take advantage of the additional year the Act provides for filing a timely claim. A refund claim may be timely under the Act even if it's filed more than three years after the return, but if the IRS receives a refund claim more than three years after the return filing date, then the only payments that the IRS is allowed to refund or credit are those made within two years of the date of the refund claim. *See* I.R.C. § 6511(b)(2)(A) and (B). In such a case, payments available for refund would typically not include amounts paid when the taxpayer filed the return, estimated tax payments, or withholding tax payments, because those payments are considered made on the filing due date. I.R.C. § 6513(a). For this reason, even though the Act may provide additional time to file a refund claim, taxpayers should file their claims as quickly as possible to make sure they're received within three years of the return filing date.

4. <u>Assessed but unpaid taxes</u>

In cases where the IRS has assessed tax and some or all of it remains unpaid, taxpayers may not file claims for refund, because the IRS may only make a credit or pay a refund if the taxpayer has overpaid. I.R.C. § 6402. Paying the tax in full is a prerequisite of filing a refund claim and for suing for a refund. *See Flora v. United States*, 362 U.S. 145 (1960); *Weber v. Commissioner*, 138 T.C. 348, 363 (2012). The Code prohibits taxpayers from filing a claim for an abatement of income tax assessments. I.R.C. § 6404(b). Nevertheless, taxpayers may informally request an abatement, and the IRS is authorized to abate the unpaid portion of any assessment that is excessive in amount. I.R.C. § 6404(a)(1). Thus, in cases where the IRS assessed tax for amounts that qualify as non-taxable payments under the general welfare exclusion and those assessments have not been paid, the IRS may abate the excessive amount of the assessments.

5. <u>45-day interest rule</u>

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[4] This issue also arises with late-filed returns. Absent an extension of time to file, a return filed more than three years after the due date and claiming a refund will only be able to reach payments made within three years of the return filing date (which in this example is the same as the refund claim date). Any payments deemed made on the due date of the return by section 6513(a) will be too old and therefore unavailable for credit or refund, pursuant to section 6511(b)(2)(A). Likewise, while a refund claim filed within three years of the return filing date will be able to access any payments made within three years before the date of the refund claim, if the return itself were filed late, a refund claim submitted toward the end of the three-year window after the return filing date may not reach any payments that are deemed made on the original due date.

When an overpayment is refunded within 45 days after a taxpayer claims a refund, the IRS may not pay interest for the period from the date the taxpayer filed the claim to the date the IRS makes the refund. I.R.C. § 6611(e)(2). In such a case, overpayment interest will run from the date of the overpayment to the date the taxpayer files the refund claim and will stop on the refund claim date. But if the IRS is unable to pay a refund allowable under the Code and Act within 45 days of the date of the claim, then the IRS will pay overpayment interest from the date of the overpayment to a date not more than 30 days before the IRS makes the refund. I.R.C. §6611(b)(2).

Please call David Skinner at (202) 317-5240 if you have any further questions.