OFFICE OF
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DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
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INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE
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MEMORANDUM FOR

FROM: Deborah A. Butler
Assistant Chief Counsel (Field Service) CC:DOM:FS:PROC

SUBJECT: Section 6425 Adjustment of Overpayment of Estimated Income Tax

This Field Service Advice responds to your memorandum dated January 15, 1999. Field Service Advice is not binding on Examination or Appeals and is not a final case determination. This document is not to be cited as precedent.

LEGEND:

X =

Y =

X's Representative =

Year 1 =
Year 2 =
Year 3 =
Year 4 =
Year 5 =
Year 6 =
Year 7 =

State =

$a =

$b =

$c =
$d =

ISSUE(S):

1. Did X authorize the transfer of $b from its Year 5 estimated tax payments to pay other assessed liabilities?

2. If the transfer of $b million was not authorized, is X now entitled to a credit election or refund with respect to that amount?

CONCLUSION:

1. X authorized and directed the transfer of the $b from its Year 5 overpaid estimated taxes payments to other assessed liabilities.

2. Even if the transfer was erroneous, X is not entitled to any refund or credit-elect with respect to that amount.

FACTS:

X files its federal income tax returns on a calendar year basis. On March 17, Year 6, X filed Form 7004, Application for Automatic Extension of Time to File Corporation Income Tax Return, and a Form 4466, Corporation Application for Quick Refund of Overpayment of Estimated Tax. The Form 4466 indicated an overpayment of X's federal income taxes for Year 5 in the amount of $a, based on its expected income tax liability. Three days later, X's Deputy Conservator and Chief Executive Officer, Y, directed the Internal Revenue Service (Service) by letter, dated March 20, Year 6, to "withhold $b" of the refund "pending potential assessments from the [Service's] ongoing examination." The remainder of the refund was to be mailed to X, "in Conservation."[1]

On March 25, Year 6, the Service refunded the difference between the adjustment X had applied for and the amount X had directed the Service to withhold. As instructed, the Service withheld $b, and on April 15, Year 6, transferred a portion of those monies to X's excise tax accounts for Years 2 and 3, currently under examination. On May 1, Year 6, X sent a second letter to the Service, reiterating its instructions that $b were to be withheld pending potential assessments from the ongoing examinations. In this second letter, X stated it would "not demand payment within the next sixty (60) days."

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[1] Prior to filing Form 4466, X had been placed in conservatorship, pursuant to court order, creditors and the public. At the time the conservatorship order was entered, X's calendar Years 1 and 2 were under audit. Thereafter, the Service expanded its audit to include later Years 3 through 5.

The Service assessed $c in excise taxes for Years 1 through 5, on June 13, Year 6. Four days later on June 17, the monies that had been transferred to the Year 2 and Year 3 excise tax accounts were credited against these assessments. The remaining portion of the $b, which had been withheld from the allowed adjustment of overpaid estimated taxes, was transferred and credited on this same date, June 17, Year 6, against the excise tax assessments. The Service notified X of the credit transfer as part of its demand for payment of whatever excise taxes remained outstanding.[2]

X filed its Year 5 Form 1120 on September 7, Year 6, and claimed as a refund a portion of the $b in estimated tax it had paid during Year 5. The balance, $d , X elected to use as a credit against estimated tax liabilities for the succeeding Year 6. However, X received no refund, and nothing was credited to its estimated tax liabilities, because the Service had previously adjusted X's estimated tax payments downward pursuant to its Form 4466, crediting $b against assessed excise tax. In September of Year 7, X filed a Form 1120 for Year 6, reflecting as a payment of tax, the credit elect taken on its Year 5 Form 1120. Since X's Year 5 account was not overpaid, the credit elect was in effect disallowed. Accordingly, X received a notice and demand for unpaid Year 6 income taxes, plus penalties and interest.

X now claims that, because the Service failed to act upon its Form 4466–the application for adjustment of overpaid estimated tax–within 45 days from the filing date of the application, the Service was prohibited from crediting $b of that adjustment against its outstanding excise tax liabilities. According to X, $b remains an estimated tax overpayment for Year 5, and must be credited, pursuant to its election, to the succeeding year's estimated tax liability. In addition, X claims that its letters directing the Service to apply $b of the adjustment to pending assessments in the ongoing examination meant crediting to Year 6, which was not under audit at the time. X further contends that its express statement it would not demand payment of this amount within the next 60 days, did not relieve the Service of its obligation to comply with the time limits of section 6425.

LAW AND ANALYSIS

Section 6425 allows a corporation which overpays its estimated income tax to file an application for an adjustment ("quick refund") of the overpayment. Thus, section 6425 provides, in part, that

> ... [a] corporation may, after the close of the taxable year and on or before the 15th day of third month thereafter, and before the day on which it files a return for such taxable year, file an application for an adjustment of an overpayment ... of estimated income tax for such taxable year.

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[2] An additional overpayment from X's Form 1120 for Year 2, was applied (in December Year 6) to fully pay the excise tax accounts.

The statute further provides that "[w]ithin a period of 45 days from the date on which an application for an adjustment is filed ..., the Secretary shall make, to the extent he deems practicable in such period, a limited examination of the application ... and shall determine the amount of the adjustment upon the basis of the application and the examination." Code § 6425(b)(1). While the Secretary has the express authority to "disallow, without further action, any application which he finds contains material omissions or errors which he deems cannot be corrected within such 45 days," ibid, if he allows the adjustment, "[t]he Secretary, within the 45 day period ..., may credit the amount of the adjustment against any liability in respect of an internal revenue tax on the part of the corporation and shall refund the remainder to the corporation." Id., § 6425(b)(2).

Although the statute provides that, within the 45 days from the date of the application, the Secretary shall act upon the same and may credit the adjustment against any liability, the statute provides no sanction for failure to act. The statute does not bar the Service from later crediting the amount of adjustment against any liability, and the plain language of the statute does not provide that, outside the 45 days, the amount taxpayer has applied for shall be automatically refunded.

Here, the Service made every effort, and indeed, followed to the letter, X's instructions for the adjustment of overpaid estimated income tax. The Service withheld $b "pending potential assessments from the ongoing examination," and refunded the remaining adjustment to X well within the time limits of section 6425. (Letters, dated March 20 and May 1, Year 6.) The Service transferred a large portion of the $b, within the statutory 45-day period, as an advance payment or deposit against the pending assessments. And when the excise taxes in the ongoing examination were assessed on June 13, Year 6, the Service credited those remittances, and the remaining amount of the $b withheld from X's adjustment, against the outstanding assessed liabilities. While not within the time limits of section 6425, this crediting occurred pursuant to X's instructions and is simply not sanctionable.[3]

In a similar provision for "quickie refunds" resulting from net operating loss carrybacks and carrybacks of investment tax credits, Code section 6411 requires that, within 90 days from the filing date of the application, the Secretary shall act upon the application. In construing this statute, the courts have held that the Secretary's failure to act within the time limits is without remedy. See Trif-Tee, Inc.,

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[3] The facts could be construed to show X and the Service agreeing to an arrangement under which X remitted, and the Service accepted, $b as a deposit in the nature of a cash bond, prior to the Service's assessment of the excise taxes. See Rosenman v. United States, 323 U.S. 658 (1945). Under Rev. Proc. 84-58, a taxpayer under audit who expects to receive an adverse determination, must expressly designate the remittance as a deposit. When a deposit is made in accordance with this Revenue Procedure, it is returnable on demand, without interest, until such time as the Service is authorized to make the assessment.

492 F. Supp. 530 (D. N.C. 1979), aff'd without opinion 628 F.2d 1351 (4th Cir. 1980), cert. denied,449 U.S. 1124 (1981). The same would hold true here. Section 6425 is simply not enforceable by the taxpayer. In fact, Treas. Reg. section 1.6425-1(b)(2) prohibits relief in court from an erroneous disallowance of a section 6425 application, as to any amount sought to be recovered therein. See also, Phico Group, Inc. v. United States, 692 F. Supp. 437 (M.D. Pa. 1988). An untimely crediting of an adjustment similarly should not be actionable.

Moreover, X was not heard to complain when the Service refunded only a portion of the adjustment applied for on the Form 4466. That partial refund occurred within the 45-day time limit, and X responded, in writing, reiterating earlier instructions that the Service was to "withhold $b pending potential assessments from the ongoing examination." (Letter, dated May 1, Year 6). X expressly stated: "We will not demand payment of the said funds within the next sixty (60) days." (Ibid.) Here, the statutory time periods of section 6425 were waived by voluntary agreement.

Absent some affirmative indication of Congress' intent to preclude waiver, the Supreme Court has presumed that statutory provisions are subject to waiver by voluntary agreement of the parties. See e.g., Evans v. Jeff D., 475 U.S. 717, 730-732 (1986)(prevailing party in civil-rights action may waive its statutory eligibility for attorneys' fees). The statutory terms of section 6425 describe no circumstances which foreclose the recognition of a waiver, and the legislative history says nothing to prohibit it. S. Rep. No. 1014, 90th Cong., 2d Sess. (1968), 1968-2 C.B. 790, 800; Conf. Rep. No. 1533, 90th Cong. 2d Sess. (1968), 1968-2 C.B. 801, 804. Therefore, waiver is permissible, and has occurred here.

The facts show X knowingly and voluntarily waived any requirement that the Service act within 45 days upon the $b the Service was to withhold for later crediting. Forty-five days after filing the application, X expressly states: "We will not demand payment of the said funds within the next sixty (60) days." (Letter, dated May 1, Year 6).[4] Thus, X waived any statutory rights it may have had with respect to a "quick refund." The Service, accordingly, applied the $b as a credit against X's assessed but unpaid excise tax liabilities on June 17, Year 6.

Were X entitled to have the credit against excise tax liabilities reversed, the Service may nevertheless offset the concomitant overpayments that would be shown on the Year 5 return against the same assessed excise tax liabilities, pursuant to Code section 6402(a). Section 6402(a) provides that "[i]n the case of any overpayment, the Secretary, within the applicable statute of limitations, may credit the amount of such overpayment including any interest allowed thereon, against any liability in respect of an internal revenue tax on the part of the person who made the overpayment and shall, ... refund any balance to such person." Section 6402(b) authorizes the Secretary to prescribe regulations for the crediting against estimated tax for any year, "the amount determined by the taxpayer or the Secretary to be an

[4] These instructions repeat those of an earlier letter, dated March 20, Year 6.

overpayment of the income tax for a preceding taxable year." And in this regard, Treas. Reg. section 301.6402-3(a)(6) provides that "[n]otwithstanding [a taxpayer's indication on its return that all or part of the overpayment shown on the return is to be applied to its estimated tax for the succeeding taxable year] ..., the Internal Revenue Service ... may credit any overpayment ... against... [f]irst, any outstanding liability." "Only the balance, if any, of the overpayment remaining ... shall be treated in the manner so elected." Ibid. In all events, even if section 6425 were construed to prohibit untimely crediting, the Service would, nevertheless, be entitled to offset X's overpayments against X's excise tax liabilities.

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