OFFICE OF
CHIEF COUNSEL

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224
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INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

MEMORANDUM FOR

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

SUBJECT:

This Field Service Advice responds to your memorandum dated June 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 =

Year 1 =

Year 2 =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Amount 1 =

Amount 1a =

Amount 1b =

Amount 2 =

ISSUES:

1. Whether the adjustments agreed to in the closing agreement executed by Y constitute an agreed deficiency under Rev. Rul. 85-67, 1985-1 C.B. 364.

2. Whether X and Y's remittance was a deposit in the nature of a cash bond or a payment of tax.

CONCLUSIONS:

1. The adjustments do not constitute an agreed deficiency under the revenue ruling, but this does not mean that the Service must return the remittance preceding and associated with those adjustments.

2. Under the prevailing case authority in most circuits, the remittance was a payment of tax.

FACTS:

In Year 1, X and Y and the Internal Revenue Service entered into specific matters closing agreements to settle a dispute arising from Y's investment in a partnership. The liability resulting from this settlement was never assessed, and the period of limitations on assessment has now passed.

Before the closing agreement was executed, X and Y had remitted Amount 1, at a time when the partnership in which Y had invested had a docketed case before the United States Tax Court. Accompanying the remittance was a letter, dated Date 1, which stated:

> In accordance with the Rev. Proc. 84-58 and Ann. 86-108, we enclose a check in the amount of Amount 1 in payment of the liability for Year 2 to be applied as follows:
>
> Year 2
>
> Tax Amount 1a

Interest Amount 1b

Total Amount 1

This remittance is an advance payment on account and not a payment in the nature of a cash bond. Please post this remittance accordingly.

The remitted amount was posted to X and Y's account for Year 2 as an advance payment of a determined deficiency and a designated payment of interest.

On Date 2, the Service sent X and Y a statement of change to their account, which indicated that they would receive a refund in the amount of Amount 2 if they owed no other obligations. On Date 3, X and Y untimely requested a refund, with interest, in the amount reflected in the notice. Relying in part on Rev. Rul. 85-67, 1985-1 C.B. 364, the Service rejected the request. On Date 4, the Service formally denied X and Y's claim for refund. X and Y now maintain that the remittance was a deposit in the nature of a cash bond, and is returnable.

LAW AND ANALYSIS

Issue 1:

In Rev. Rul. 85-67, the Service addressed whether an advance payment of tax had to be refunded on account of the failure to assess the underlying liability within the limitations period. The Service held that it did not. According to the ruling, where taxes and interest legally due have been paid before the expiration of the limitations period for assessment, they cannot be recovered merely because they have not been formally assessed. The advance payment of an agreed deficiency, plus interest, does not constitute an refundable overpayment of tax.

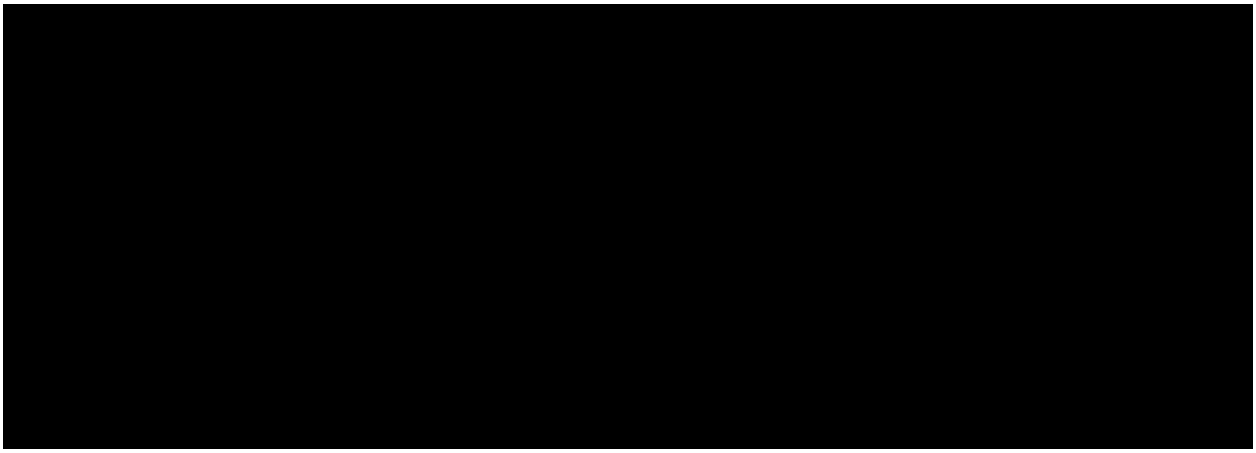
In contrast to the revenue ruling, in this case X and Y and the Service never agreed to a deficiency in a specific amount. However, in our view this difference does not require refund of the amount remitted by the taxpayer. Under Rev. Proc. 84-58, 1984-2 C.B. 501, amounts remitted to the Service may be treated as payments; whether they are or not depends on the circumstances of the remittance. And, as we will also discuss below, most courts have held that a tax can be paid before assessment, or even in the absence of an assessment.

Issue 2:

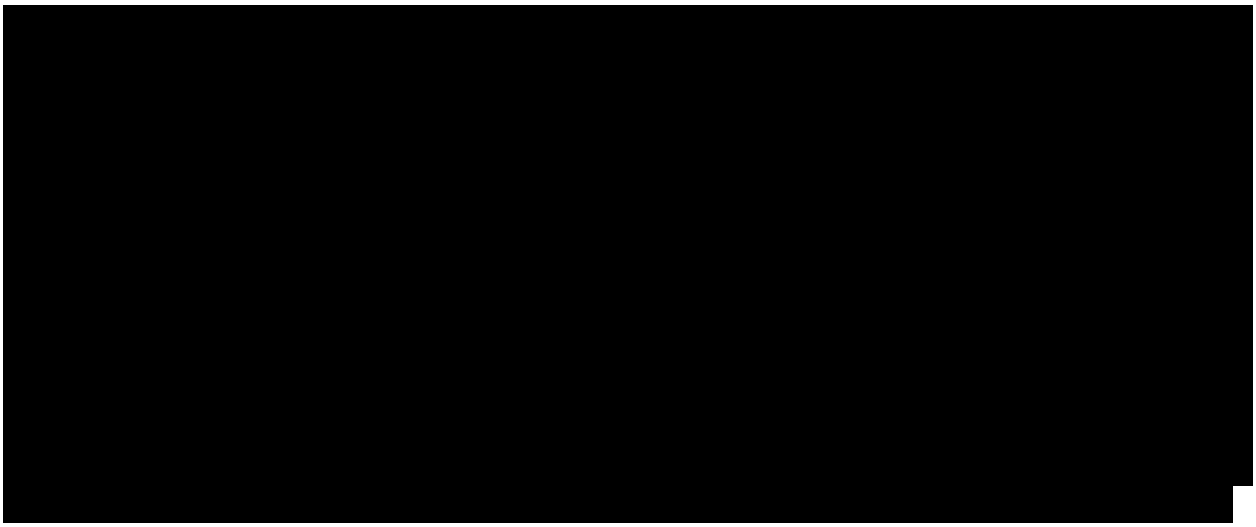
There is no uniformity among the circuit courts of appeals regarding whether a remittance can be a payment if an assessment is not later made. Most courts have held that assessment is not a prerequisite for payment. See, e.g., Lewyt Corp. v. Commissioner, 215 F.2d 518 (2d Cir. 1954), aff'd in part and rev'd in part on another issue, 349 U.S. 237 (1955); Ewing v. United States, 914 F.2d 499 (4th Cir.

1990); Moran v. United States, 63 F.3d 663 (7th Cir. 1995). The Fifth Circuit, however, has adopted a per se rule, under which payment can never precede assessment. See Thomas v. Mercantile Nat'l Bank, 204 F.2d F.2d 943 (5th Cir. 1953); accord, United States v. Dubuque Packing Co., 233 F.2d 453 (8th Cir. 1956) (following Mercantile National Bank).[1] In the Federal Circuit, payment can be made in the absence of a later assessment, but under certain circumstances a remittance under protest may be a deposit as a matter of law. See New York Life Ins. Co. v. United States, 118 F.3d 1553 (Fed. Cir. 1997), cert. denied, 523 U.S. 1094 (1998). For a remittance under protest to be a deposit, the taxpayer must reserve the right to seek recovery of the tax. New York Life Ins. Co., 118 F.3d at 1559.

In this case, X and Y did not reserve the right to seek a refund of the amount remitted to the Service. On the contrary, by entering into a closing agreement after making a remittance, X and Y renounced the right to further contest any associated liabilities. The closing agreement confirmed the liabilities toward which X and Y had unambiguously made a payment under Rev. Proc. 84-58. Under Treas. Reg. § 301.7121-1(d)(2), the adjustments agreed to in the closing agreement should have resulted in an assessment of tax. The Service's failure to make an assessment, however, does not convert the remittance made by X and Y into a deposit in the nature of a cash bond. See Ewing at 504 ("[A] payment results from the remittance by a taxpayer concomitant with the recognition of a tax obligation whether by filing with a return, resolution of a dispute by an agreement, as in this case, or otherwise."). The statement of change to account, which held out the possibility of a refund for X and Y, could not undo the finality of the adjustments agreed to by the taxpayers, or make an amount refundable that was not otherwise refundable by law.



[1] In Essex v. Vinal, 499 F.2d 226 (8th Cir. 1974), the Eighth Circuit, without discussing its prior decision in Dubuque Packing Co., held that a remittance of estimated taxes prior to assessment constituted a payment when treated as such by the taxpayer and the Service.



If you have further questions, please call.