



OFFICE OF
CHIEF COUNSEL

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
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MEMORANDUM FOR LEWIS J. ABRAHAMS, ASSOCIATE AREA COUNSEL
(SMALL BUSINESS/SELF-EMPLOYED) CC:SB:1:LI
ATTN: PARIEGGER

/S/

FROM: ROBERT A. MILLER, SENIOR TECHNICIAN REVIEWER
BRANCH 3 (COLLECTION, BANKRUPTCY AND
SUMMONSES)

SUBJECT: SIGNIFICANT SERVICE CENTER ADVICE

This responds to your request dated June 5, 2001, in connection with questions posed by the Brookhaven Service Campus.

ISSUES

1. Generally, who is entitled to refund of an overpayment belonging to an intestate decedent:

(a) as between the administrator and a closest surviving relative other than a surviving spouse;

(b) as between the administrator and a surviving spouse:

(I) where the surviving spouse files a joint return with the decedent and the administrator does not disavow the return, or

(II) where the surviving spouse does not file a joint return with the decedent?

2. Under the facts of your case, where the administrator failed to notify the Service of his appointment prior to the Service making the two refunds, was the Service justified in issuing the refunds to the girlfriend (on behalf of the decedent's

children), are there defects in the girlfriend's filings, and can defects in the girlfriend's filings now be corrected to retroactively validate the refunds?

3. If the girlfriend (on behalf of the decedent's children) is the heir entitled to the estate, and no creditor has a claim on the estate, can the Service set off the refunds made to the girlfriend against the administrator's claim, viewing the administrator's claim as made on behalf of the heir?

4. If the refunds to the girlfriend were erroneous:

(a) which limitation period applies to recovery of the erroneous refunds;

(b) should the erroneous refunds be transferred from the decedent's account to an account in the girlfriend's name for recovery of the erroneous refund, and in this case can an overpayment due the girlfriend be offset against the erroneous refund?

CONCLUSIONS

1. Generally, the person entitled to refund of the overpayment belonging to an intestate decedent is:

(a) as between the administrator and a closest surviving relative other than the surviving spouse, the administrator;

(b) as between the administrator and a surviving spouse:

(I) where the surviving spouse files a joint return with the decedent and the administrator signs for the decedent or does not disavow the return, the surviving spouse;

(II) where the surviving spouse does not file a joint return with the decedent, or the administrator timely disavows a joint return filed by the spouse alone, the administrator.

2. Even though the the administrator failed to notify the Service of his status before the Service made the refunds, the Service was not justified in issuing the refunds to the girlfriend since she submitted an unsigned return and an unsigned Form 1310. Now, after appointment of the administrator, only the administrator can sign and file a return for the decedent under any status.

3. The refunds issued to the girlfriend could be set off against the claim of the administrator, if under state law the girlfriend is the heir entitled to the estate and if there is no creditor with a claim on the estate.

4. The refunds to the girlfriend were erroneous because she submitted an unsigned return and an unsigned Form 1310:

(a) the two year erroneous refund suit period applies to recovery of the erroneous refunds; and

(b) the erroneous refunds should be transferred from the decedent's account to an account in the girlfriend's name so that an overpayment due the girlfriend can be offset against the erroneous refund.

FACTS

The taxpayer (decedent) died intestate. For the tax period ending with the decedent's death, a federal income tax return, which was not a joint return, and a Form 1310, Statement of Person Claiming Refund Due a Deceased Taxpayer were filed by each of the following:

(1) the decedent's girlfriend, who is the mother of his children, who filed an unsigned return and an unsigned Form 1310, on which a box was checked stating that the filer was not a surviving spouse or personal representative; **1/**

(2) the decedent's mother, who filed a signed return and a signed Form 1310, both signed as "personal representative" but on the Form 1310 a box was checked stating that the filer was not a surviving spouse or personal representative;

(3) the appointed administrator, who signed a photocopy of the return and Form 1310 filed by decedent's mother, lining out the signature of decedent's mother and asserting that he is the court-appointed or certified personal representative of the decedent.

The filing in (2), above, occurred about ten days after the filing in (1), above; the filing in (3), above, occurred about three months after the filing in (2), above. No facts are available to indicate the extent to which the girlfriend or mother were in charge of the decedent's property, as opposed to being in possession of some property of the decedent.

In response to the first filing, the Service issued to the girlfriend a refund check for a portion of the decedent's refund. In response to the second filing, the Service issued to the girlfriend a refund check for the balance of the decedent's refund. Nothing has been paid to the mother or the administrator.

1/ For purposes of giving this advice, we assume without determining that the children are the decedent's children; you did not indicate with certainty that they are.

The first communication received by the Service from the administrator was the filing of the return and Form 1310. So far, the administrator has not provided information as to whether the girlfriend is the heir entitled to the estate or whether there is a creditor with a claim on the estate.

LAW AND ANALYSIS

Your questions concern who is entitled to refund of the overpayment belonging to the intestate decedent. The questions relate to who is entitled to file an income tax return for the period ending with the decedent's death, whether a Form 1310 is needed and who must file it, and who is entitled to the refund by reason of it becoming part of the decedent's estate. You also ask whether, if the refunds were erroneous, they can be recovered by offset.

Issue 1: Entitlement to Refunds

Before appointment of an administrator, a joint income tax return for the decedent and surviving spouse may be made by the surviving spouse alone. The surviving spouse signs for herself and in the space for the decedent's signature writes "filing as surviving spouse". A Form 1310 is not needed since the surviving spouse receives the refund as the taxpayer. IRM 3.13.222.12(2); Publication 559, Survivors, Executors and Administrators; 2000 SCA LEXIS 1, SCA 200010046, discussion of issue 4. Instructions to 2000 Form 1040; Instructions to Form 1310. 2/

Here, none of the filers filed a joint return. Thus, we do not need to reach the question of whether the girlfriend is treated as a surviving spouse under state law for purposes of return filing.

Also before appointment of an administrator, a person in charge of the decedent's property can sign and file a return for the decedent as "personal representative", even though not appointed by a court or certified. Pub. 559, at page 8. This individual must also sign and file a Form 1310.

If the girlfriend had filed a signed return and a signed Form 1310, and if the girlfriend was at that time in charge of the decedent's property, the Service would have been correct in issuing the refunds to her. Here, however, the girlfriend did not sign the return or Form 1310.

The Code provides that any return, statement or other required document must be signed in accordance with forms or regulations prescribed by the Secretary. IRC §

2/ If the surviving spouse has remarried within the year the return would cover, she cannot file a joint return with the decedent. IRC 6013(a)(2).

6061(a); Treas. Reg. §301.6061-1(b). An unsigned return is not a valid return. Unsigned documents are addressed in IRM 3.11.3.10.2(8)a and 3.13.5.3.5(1), and it is recommended that the documents be returned to the filer for signature. That solution, however, would not be appropriate after the Service is notified of the appointment of the administrator. While the Service might be willing to extend some retroactivity to the signing of a document that had been inadvertently submitted without signature, we should not do so when we are on notice that assertions thereon are, or have become, false.

Here, after notice of the appointment of the administrator, the Service cannot accept the girlfriend's, or the decedent's mother's, assertions that a court appointed or certified personal representative has not been appointed, or that she is in charge of the decedent's property. Also, the decedent's individual income tax return under any status must be signed by the administrator. **3/** I.R.C. §6012(b)(1).

Issue 2: Were Refunds Validly Issued?

If an administrator is not appointed and if there is no surviving spouse, an individual who is in charge of the decedent's property must file a completed and signed return for the decedent. IRS Publication 559 at page 8. Assuming these circumstances have occurred, the Service would be justified in refunding the overpayment to the person filing the return and Form 1310.

Here, however, even though the the administrator failed to notify the Service of his appointment before the Service made the refunds, the Service was not justified in issuing the refunds to the girlfriend since she submitted an unsigned return and an unsigned Form 1310. Also, while the Internal Revenue Manual addresses the unsigned return or unsigned Form 1310 situation and suggests that the documents be returned to the filer for signing, it does not address the unsigned documents in the context that an administrator has been appointed. When the Service is notified that an administrator has been appointed, no one else is entitled to act for the decedent or have charge of the decedent's property.

Issue 3: Setoff of refunds against Administrator's Claim

If the girlfriend is the heir to the estate, and there are no creditor claims against the estate, the refunds issued to the girlfriend could be set off, by exercise of the government's commonlaw right of setoff, against the claim of the administrator, if either the administrator agrees or the Service can establish the right of the girlfriend as heir. The question of whether the girlfriend is entitled to the estate is a matter of state law. Under the facts, it appears that the girlfriend could be entitled,

3/ If the return is a joint return, the administrator signs for the decedent and the surviving spouse signs for herself. Treas. Reg. §1.6013-1(d)(4); IRM 3.11.3.10, Decedent Returns.

under state law, to the estate on behalf of the decedent's children. If the girlfriend (on behalf of the children) is the heir and, therefore, correct claimant to the estate, the administrator presumably would be willing to notify the Service in writing that the correct individual has received the refund.

Issue 4: Recovery of Erroneous Refunds

Here, the refunds should not have been paid on the basis of the unsigned return and unsigned Form 1310 filed by the girlfriend. Thus, both refunds were erroneous. You ask what is the limitations period for the Service to recover by offset against refunds due the girlfriend if the girlfriend is not (on behalf of the children) the heir entitled to the estate.

In our view, the two year period of IRC § 6532(b) applies to recovery of the erroneous refunds. The return and Form 1310 were not signed; thus, the Service should not have made a refund based thereon. In other respects, the Form 1310 submitted by the girlfriend appears to comport with the instructions in Pub. 559. Apart from the missing signature, the Form 1310 does not misrepresent a material fact unless the girlfriend knew or had reason to know that the administrator was appointed when she filed the Form 1310. There are no facts to support what the girlfriend knew or should have known. Accordingly, it is our view that there are not sufficient facts for the Service to show that the five year period applies.

To recover under the two year period, the erroneous refunds should be transferred from the decedent's account to an account in the girlfriend's name. This will enable recovery by offset against overpayments in her name.

Please call if you have any further questions.