



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OFFICE OF
CHIEF COUNSEL

January 16, 2002

Number: **200212028**
Release Date: 3/22/2002
CC:PA:APJP:B01/SCA-156924-01
UILC: 6621.01-00

INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

MEMORANDUM FOR

FROM: James C. Gibbons
Branch Chief
CC:PA:APJP:1

SUBJECT: Proper Application of I.R.C. Section 6621(d)

This Chief Counsel Advice responds to your memorandum dated October 15, 2001. In accordance with I.R.C. § 6110(k)(3), this Chief Counsel Advice should not be cited as precedent.

ISSUE

Whether it is appropriate to apply I.R.C. § 6621(d) to nine separate factual situations.

FACTS

You have provided nine separate fact situations regarding the application of I.R.C. § 6621(d). Each of these situations are discussed separately. Unless otherwise noted, all corporations described herein are Subchapter C corporations. In addition, where a merger occurs in one of the fact situations, it is assumed that such merger complies with I.R.C. § 368(a)(1)(A), and that the surviving corporation assumes all of the merged corporation's liabilities.

Situation 1

A and B are corporations that file separate tax returns. For Year 1, A reports an underpayment and B reports no tax due and no overpayment. In Year 2, A becomes a member of an affiliated group and files a consolidated income tax return with B, its parent. On its Year 2 return, the affiliated group reports an overpayment. B seeks to net interest rates for the consolidated return's Year 2 overpayment against A's Year 1 underpayment.

SCA-156924-01

You have asked the following questions regarding this factual situation: 1.A. May B, as the parent of the affiliated group, net interest from the affiliated group's Year 2 overpayment against interest due from A's Year 1 underpayment interest; 1.B. In the event that interest netting is possible, which taxpayer is the appropriate taxpayer for filing an interest netting claim; and finally, 1.C. What type of background research must Service Center employees perform regarding consolidated returns?

Situation 2

For Year 1, Corporations A and B filed a consolidated income tax return, with A as the parent. In its Year 1 return, the affiliated group claimed an overpayment of income tax. In addition, A and B file separate excise and employment tax returns. On their respective excise and employment tax returns, A and B report underpayments. A, as the parent, files a claim to net interest from the affiliated group's Year 1 overpayment against interest due from A and B's respective excise and employment tax underpayments.

You have asked the following questions regarding this factual situation: 2.A. Does I.R.C. § 6621(d) apply to this situation; and 2.B. Assuming that I.R.C. § 6621(d) applies to this situation, which taxpayer may file the interest netting claim?

Situation 3

For Year 1, an affiliated group filed a consolidated income tax return. Sometime after the Year 1 return has been filed, the IRS determined that there is an underpayment with respect to this return. In Year 3, subsidiaries that did not exist during Year 1 are incorporated and join the affiliated group. The affiliated group filed a consolidated income tax return for Year 3, and reported no income tax due and no overpayment. Also in Year 3, the new subsidiaries filed their own excise and employment tax returns and each of the new subsidiaries claimed an overpayment on their respective excise and employment tax returns. The parent from the affiliated group wants to net interest from the new subsidiaries' respective Year 3 overpayments against interest due from the affiliated group's Year 1 underpayment.

You have asked the following questions regarding this factual situation: 3.A. Does I.R.C. § 6621(d) apply to this situation; and 3.B. Assuming that I.R.C. § 6621(d) applies to this situation, which taxpayer may file the interest netting claim?

Situation 4

The same facts as Situation 3, except that the affiliated group reports an overpayment on its Year 3 consolidated income tax return. The IRS offsets the affiliated group's Year 3 overpayment against its Year 1 underpayment. As with Situation 3, the affiliated group requests that interest from the new subsidiaries' Year 3 excise and employment tax overpayments be offset against interest due from the remainder of the affiliated group's Year 1 underpayment.

SCA-156924-01

You have asked the following questions regarding this factual situation: 4.A. Does I.R.C. § 6621(d) apply to the offset of interest from the new subsidiaries' respective Year 3 overpayments of excise and employment taxes against interest due from the affiliated group's Year 1 underpayment; and 4.B. Assuming that I.R.C. § 6621(d) applies to this situation, which taxpayer may file the interest netting claim?

Situation 5

In Year 1, corporation A has an overpayment. In Year 3, corporation B reports an underpayment. In Year 4 A merges with B, with B surviving. B wants to net interest from A's Year 1 overpayment against interest due from B's Year 3 underpayment.

You have asked the following questions regarding this factual situation: 5.A. Does I.R.C. § 6621(d) apply to this situation; 5.B. Does the type of acquisition make any difference; 5.C. Assuming that I.R.C. § 6621(d) applies to this situation, which taxpayer may file the interest netting claim; and 5.D. What level of substantiation must be provided to the IRS Service Center employee?

Situation 6

Corporation B makes an underpayment in Year 1. This underpayment is not assessed by the IRS until Year 5. Corporation A pays this assessment. In Year 2, B acquires corporation A. In Year 3, A has an overpayment. Corporation A files a request for netting interest from its Year 3 overpayment against interest due from B's Year 1 underpayment.

You have asked the following questions regarding this factual situation: 6.A. Does I.R.C. § 6621(d) apply to this situation; 6.B. Does the type of acquisition make any difference; 6.C. Assuming that I.R.C. § 6621(d) applies to this situation, which taxpayer may file the interest netting claim; and 6.D. What level of substantiation must be provided to the IRS Service Center employee?

Situation 7

In Year 4 Corporation A claimed an overpayment. Corporation B, which is described as a "transitory holding company" reported an underpayment in Year 4. In Year 5, A and B merge with A surviving. A files a claim to net interest from its Year 4 overpayment against interest due from B's Year 4 underpayment. This fact pattern assumes that B is a C corporation that was conducting its own business prior to its merger with A.

You have asked the following questions regarding this factual situation: 7.A. Does I.R.C. § 6621(d) apply to this situation; 7.B. Does the type of acquisition make any difference; 7.C. Does the fact that Corporation B was the holding company for Corporation A make any difference in the analysis? If so, what level of substantiation must a Service Center receive regarding this issue; and 7D. What level of research must a Service Center employee perform regarding this type of interest netting claim?

SCA-156924-01

Situation 8

Corporation A is the parent of an affiliated group. For Year 1, this affiliated group filed a consolidated income tax return, reporting an underpayment. Corporation B was a member of this affiliated group during Year 1. In Year 2, Corporation B created corporations C, D and E through I.R.C. § 351 transfers. B remained a member of the affiliated group. C, D and E never joined the affiliated group. For Years 3 and 4, C, D and E all claimed employment tax overpayment on each of their respective returns. Corporation A wants to net interest from C, D and E's Year 3 and Year 4 overpayments against interest due from the affiliated group's Year 1 underpayment.

You have asked the following questions regarding this factual situation: 8.A. Does I.R.C. § 6621(d) apply to this situation; 8.B. Assuming that I.R.C. § 6621(d) applies to this situation, which taxpayer may file the interest netting claim; and 8.C. Assuming that corporation A is allowed to file an interest netting claim, what form of consent is required from corporations C, D and E?

Situation 9

Corporation A is the parent of an affiliated group. For Year 1, the affiliated group filed a consolidated income tax return and reported an underpayment. Corporation B was a member of this affiliated group. B is the 100 percent owner of corporation C. C is not a member of the affiliated group, and files its own income and employment tax returns. For Year 1, C claimed an overpayment in income and employment taxes. Corporation A filed a claim to net C's Year 1 overpayment interest against A's Year 1 underpayment interest.

You have asked the following questions regarding this factual situation: 9.A. Does I.R.C. § 6621(d) apply to this situation; 9.B. Assuming that I.R.C. § 6621(d) applies to this situation, which taxpayer may file the interest netting claim; and 9.C. Assuming that A may file an allowable interest netting claim, what form of consent is required from C.

LAW AND ANALYSIS

In General

I.R.C. § 6601(a) requires that interest be paid by a taxpayer, if any amount of tax "is not paid on or before the last date prescribed for payment". I.R.C. § 6072(b). Any tax that has not been paid on or before the last date prescribed for payment is commonly known as an "underpayment."

In addition, where a taxpayer has made an overpayment with respect to any internal revenue tax, I.R.C. § 6611(a) requires that interest be paid to the taxpayer who made the overpayment. Neither the Code nor the regulations promulgated thereunder define the term "overpayment." The United States Supreme Court defines "overpayment" as

SCA-156924-01

“any payment in excess of that which is properly due.” Jones v. Liberty Glass Co., 332 U.S. 524, 531 (1947); see also United States v. Dalm, 494 U.S. 596 (1990).

I.R.C. §§ 6621(a)(1) and (2) establish the interest rates for both overpayments and underpayments of tax. I.R.C. § 6621(d) provides that to the extent interest is payable for any period under subchapter A and allowable under subchapter B on equivalent underpayments and overpayments by the same taxpayer of tax imposed by the Code, the net rate of interest under I.R.C. § 6621 on such amounts shall be zero for such period.

You have provided nine separate factual situations, and, among other questions, you have asked whether I.R.C. § 6621(d) applies to any of the situations.

Situation 1

1.A. May B, as the parent of the affiliated group, net interest from the affiliated group’s Year 2 overpayment against interest due from A’s Year 1 underpayment interest?

At present this question is unresolved. Under these facts, it is unclear whether the Year 2 overpayment is attributable to either A, B or both A and B. The use of the affiliated group’s overpayment will generally be at the discretion of the parent of the affiliated group. See Treas. Reg. § 1.1502-77(a). However, this reflects the practical application of a rule designed primarily for the convenience and protection of the government and may not reflect the actual entitlement to a refund. See In the Matter of Bob Richards Chrysler-Plymouth Corporation, Inc. v. England, 473 F.2d 262 (9th Cir. 1973).

It is theoretically possible that interest netting could apply, but such determination would be based on the facts and circumstances of the particular case. In the event that the Service Center receives a claim for interest netting with similar facts, it is recommended that the local Area Counsel attorney submit a request for Technical or Field Service Advice with the National Office.

1.B. In the event that interest netting is possible, which taxpayer is the appropriate taxpayer for filing an interest netting claim?

Assuming that interest netting is possible, because the affiliated group’s overpayment will generally be at the discretion of the parent of the affiliated group, B would need to file the appropriate claim. See Treas. Reg. § 1.1502-77.

1.C. What type of background research must Service Center employees perform regarding consolidated returns.

Service Center employees will have to do sufficient background research to the extent that such employee is satisfied that the information presented by a taxpayer reflects what actually happened. If the Service Center employee is concerned about the adequacy of substantiation provided by a specific taxpayer, it is recommended that the respective employee seek guidance from the local Area Counsel.

SCA-156924-01

Situation 2

2.A. Does I.R.C. § 6621(d) apply to this situation?

At present this question is unresolved. Under these facts, it is unclear whether the Year 1 overpayment from the affiliated group is attributable to either A, B or both A and B. The use of the affiliated group's overpayment will generally be at the discretion of the parent of the affiliated group. See Treas. Reg. § 1.1502-77(a). However, this reflects the practical application of a rule designed primarily for the convenience and protection of the government and may not reflect the actual entitlement to a refund. See In the Matter of Bob Richards Chrysler-Plymouth Corporation, Inc. v. England, 473 F.2d 262 (9th Cir. 1973).

It is theoretically possible that interest netting could apply, but such determination would be based on the facts and circumstances of the particular case. In the event that the Service Center receives a claim for interest netting with similar facts, it is recommended that the local Area Counsel attorney submit a request for Technical or Field Service Advice with the National Office.

2.B. Assuming that I.R.C. § 6621(d) applies to this situation, which taxpayer may file the interest netting claim?

Assuming that interest netting is possible, because the affiliated group's overpayment will generally be at the discretion of the parent of the affiliated group, A would need to file the appropriate claim. See Treas. Reg. § 1.1502-77.

Situation 3

3.A. Does I.R.C. § 6621(d) apply to this situation?

No. I.R.C. § 6621(d) requires that the same taxpayer both be liable for the underpayment of tax, and entitled to the overpayment of tax. In this case, the newly created subsidiaries are not liable for the Year 1 underpayment of tax. Because the subsidiaries are not liable for the underpayment, it is not possible to net interest that is owed by the affiliated group on the underpayment against interest for which the subsidiaries are entitled by virtue of their respective Year 3 overpayments.

3.B. Assuming that I.R.C. § 6621(d) applies to this situation, which taxpayer may file the interest netting claim?

Because it is not possible to net interest from the subsidiaries' respective Year 3 excise and employment tax overpayments against interest due from the affiliated group's Year 1 underpayment, none of the taxpayers may file an interest netting claim.

Situation 4

SCA-156924-01

4.A. Does I.R.C. § 6621(d) apply to the offset of interest from the new subsidiaries' respective Year 3 overpayments of excise and employment taxes against interest due from the affiliated group's Year 1 underpayment?

No. I.R.C. § 6621(d) requires that the same taxpayer both be liable for the underpayment of tax, and entitled to the overpayment of tax. In this case, the newly created subsidiaries are not liable for the affiliated group's Year 1 underpayment of tax. Because the subsidiaries are not liable for the underpayment, it is not possible to net interest that is owed on the Year 1 underpayment against interest owed to the subsidiaries by virtue of their respective Year 3 overpayments.

4.B. Assuming that I.R.C. § 6621(d) applies to this situation, which taxpayer may file the interest netting claim?

Because it is not possible to net interest from the subsidiaries' respective Year 3 excise and employment tax overpayments against interest due from the affiliated group's Year 1 underpayment, none of the taxpayers may file an interest netting claim.

Situation 5

5.A. Does I.R.C. § 6621(d) apply to this situation?

Yes. Because A and B merged, with B surviving, B has assumed A's liabilities, and is entitled to A's overpayment from Year 1. B is also liable for its Year 3 underpayment. Accordingly, because B is both entitled to A's Year 1 overpayment, and is liable for its Year 3 underpayment, B would be entitled to file a claim for interest netting.

5.B. Does the type of acquisition make any difference?

Yes. It is important that B assume A's liabilities. If A were still in existence after B acquired A's stock, then B would not be entitled to interest netting, because A would be entitled to its Year 1 overpayment and B would be liable for its Year 3 underpayment. As stated above, I.R.C. § 6621(d) requires that the same taxpayer be both entitled to an overpayment and at the same time, be liable for an underpayment.

5.C. Assuming that I.R.C. § 6621(d) applies to this situation, which taxpayer may file the interest netting claim?

Because B is the surviving corporation, B would be entitled to file the interest netting claim.

5.D. What level of substantiation must be provided to the IRS Service Center employee?

Service Center employees will have to do sufficient background research to the extent that such employee is satisfied that the information presented by a taxpayer reflects what actually happened. If the Service Center employee is concerned about the

SCA-156924-01

adequacy of substantiation provided by a specific taxpayer, it is recommended that the respective employee seek guidance from the local Area Counsel.

Situation 6

6.A. Does I.R.C. § 6621(d) apply to this situation?

No. Both A and B survived A's acquisition of B. Accordingly, both A and B are considered separate taxpayers. Consequently, A cannot net its Year 3 overpayment interest against B's Year 1 underpayment interest. The fact that A paid B's tax liability does not entitle it to net its overpayment interest against B's Year 1 underpayment interest. I.R.C. § 6621(d) requires that the same taxpayer be both liable for an underpayment of tax, and be entitled to an overpayment. A was not liable for B's Year 1 underpayment, and could not have made an overpayment with respect to B's Year 1 tax year. Accordingly, interest netting is not possible in this situation.

6.B. Does the type of acquisition make any difference?

Yes. It is important that A assume B's liabilities. If A merged with B, and only A survived the merger, the situation would be different. See the explanation for Situation 5 above.

6.C. Assuming that I.R.C. § 6621(d) applies to this situation, which taxpayer may file the interest netting claim?

As it was determined that A is not entitled to net interest from A's Year 3 overpayment against interest due from B's Year 1 underpayment, interest netting does not apply in this case. Accordingly, none of the taxpayers may file an interest netting claim.

6.D. What level of substantiation must be provided to the IRS Service Center employee?

Service Center employees will have to do sufficient background research to the extent that such employee is satisfied that the information presented by a taxpayer reflects what actually happened. If the Service Center employee is concerned about the adequacy of substantiation provided by a specific taxpayer, it is recommended that the respective employee seek guidance from the local Area Counsel.

Situation 7

7.A. Does I.R.C. § 6621(d) apply to this situation?

Yes. Because A and B merged, with A surviving, A has assumed B's liabilities, and is liable for B's underpayment from Year 4. A is also entitled to its Year 4 overpayment. Accordingly, because A is both entitled to its Year 4 overpayment, and is liable for B's Year 4 underpayment, A would be able to file a claim for interest netting.

SCA-156924-01

7.B. Does the type of acquisition make any difference?

Yes. It is important that A assume B's liabilities. If B were still in existence after A acquired B, than A would not be entitled to interest netting, because B would be liable for its Year 1 underpayment and A would be entitled to its Year 4 overpayment. As stated above, I.R.C. § 6621(d) requires that the same taxpayer be both entitled to an overpayment and at the same time, be liable for an underpayment.

7.C. Does the fact that Corporation B was the holding company for Corporation A make any difference in the analysis? If so, what level of substantiation must a Service Center receive regarding this issue?

As B is a C corporation that operated its own business, it does not matter for the purpose of applying I.R.C. § 6621(d), that A described B as a "transitory holding company."

7D. What level of research must a Service Center employee perform?

Service Center employees will have to do sufficient background research to the extent that such employee is satisfied that the information presented by a taxpayer reflects what actually happened. If the Service Center employee is concerned about the adequacy of substantiation provided by a specific taxpayer, it is recommended that the respective employee seek guidance from the local Area Counsel.

Situation 8

8.A. Does I.R.C. § 6621(d) apply to this situation?

No. Under I.R.C. § 6621(d), the same taxpayer must be both liable for an underpayment and entitled to an overpayment. C, D and E are corporations that were created by B in Year 2. B is still in existence and was a member of the affiliated group in Year 1. In addition, B is severally liable for the affiliated group's Year 1 underpayment. Treas. Reg. § 1.1502-6(a). Neither C, D or E are liable for the affiliated group's Year 1 tax liability. Accordingly, it would not be possible for A to net interest from C, D and E's Year 3 and Year 4 overpayments against interest the affiliated group owes on its Year 1 underpayment.

8.B. Assuming that I.R.C. § 6621(d) applies to this situation, which taxpayer may file the interest netting claim?

As stated in response to question 8A., under I.R.C. § 6621(d), it is not possible for A to net interest from C, D and E's respective Year 3 and Year 4 overpayments against interest the affiliated group owes on its Year 1 underpayment. Accordingly, none of the taxpayers may file an interest netting claim in this case.

SCA-156924-01

8.C. Assuming that corporation A is allowed to file an interest netting claim, what form of consent is required from corporations C, D and E?

Because interest netting does not apply to this case, it is not necessary to discuss what type of consent may or may not be required from corporations C, D and E.

Situation 9

9.A. Does I.R.C. § 6621(d) apply to this situation?

No. Corporation C is a taxpayer that is independent of the affiliated group with its own tax liabilities. I.R.C. § 6621(d) requires that the same taxpayer be both liable for an underpayment and be entitled to an overpayment. In this case, C is not liable for the affiliated group's Year 1 underpayment. Accordingly, A cannot net interest from C's Year 1 income and employment tax overpayments against interest that the affiliated group owes for its Year 1 underpayment. Although Treas. Reg. § 1.1502-6(a) makes B severally liable for the affiliated group's Year 1 tax liability, C is not liable for such liability. Accordingly, interest netting does not apply in this case.

9.B. Assuming that I.R.C. § 6621(d) applies to this situation, which taxpayer may file the interest netting claim?

I.R.C. § 6621(d) does not apply to this situation. Accordingly, it is not necessary to discuss which taxpayer may file the interest netting claim.

9.C. Assuming that A may file an allowable interest netting claim, what form of consent is required from C.

I.R.C. § 6621(d) does not apply to this situation. Accordingly, it is not necessary to discuss what form of consent is required from C.

If you have any questions, please call.

JAMES C. GIBBONS
Branch Chief