ACKNOWLEDGED SIGNIFICANT ADVICE, MAY BE DISSEMINATED

Office of Chief Counsel
Internal Revenue Service

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SCA 1998-009

memorandum

date: April 3, 1998

to: District Counsel, Brooklyn CC:NER:BRK

from: Assistant Chief Counsel (Income Tax & Accounting)
CC:DOM:IT&A:3

subject: Significant Service Center Advice
TL-N-6778-97

This responds to your request for Significant Advice dated October 30, 1997, in connection with a question posed by the Taxpayer Relations Branch of the Brookhaven Service Center concerning the treatment of a remittance received with a Form 4868, Application for Automatic Extension of Time to File U.S. Individual Income Tax Return.

Disclosure Statement

Unless specifically marked "Acknowledged Significant Advice, May Be Disseminated" above, this memorandum is not to be circulated or disseminated except as provided in CCDM (35)2(13)3:(4)(d) and (35)2(13)4:(1)(e). This document may contain confidential information subject to the attorney-client and deliberative process privileges. Therefore, this document shall not be disclosed beyond the office or individual(s) who originated the question discussed herein and are working the matter with the requisite "need to know." In no event shall it be disclosed to taxpayers or their representatives.

Issue

You requested our advice concerning whether a remittance is a payment or a deposit, in the context of a taxpayer's claim for refund, when it is submitted simultaneously with a Form 4868, Application for Automatic Extension of Time to File U.S. Individual Income Tax Return.

Your memorandum concludes that a remittance with a Form 4868 should be regarded as a payment by Service Centers, unless the following types of facts appear in connection with the remittance: (1) the Service treated the remittance as a deposit, by for instance, placing it in a suspense account; (2) the remittance and Form 4868 is accompanied by statements or a letter indicating that such should be designated as a deposit; or (3) the facts existing at the time of the receipt of the remittance and the Form 4868 are such that the Service is aware of the taxpayer's intent to submit a deposit, rather than a payment of tax.

Conclusion

We conclude that amounts remitted with a Form 4868 are payments of tax as a matter of law. *Gabelman v. Commissioner*, 86 F.3d 609 (6th Cir. 1996), *aff'g,* T.C. Memo. 1993-592; *Nunziato v. United States*, 78 AFTR2d 96-5066 (D. Mass. 1996); *Risman v. Commissioner*, 100 T.C. 191 (1993), AOD CC-1997-006 (May 5, 1997); *but see Harden v. United States*, 76 AFTR2d 95-7980 (5th Cir. 1995).

Discussion

Section 6511(b)(1) of the Internal Revenue Code provides that the Service may not allow or make a credit or refund of tax after the expiration of the period of limitations prescribed in § 6511(a) unless a claim for such credit or refund was filed within the time prescribed thereunder. Pursuant to § 6511(a), a claim for credit or refund of an overpayment of tax for which a return is required to be filed must be filed within three years of the time the return was filed or two years from the time the tax was paid, whichever period expires later. Further, if the claim for refund was filed within the 3-year period prescribed in subsection (a), the amount payable to the taxpayer with respect to any claim for refund is limited to the tax paid during the 3 years immediately preceding the filing of the claim (plus the period of any extension of time for filing the return). I.R.C. § 6511(b)(2)(A). If the claim is not filed within three years of the filing of the return, the amount of credit or refund is limited to the portion of tax paid during the two years immediately preceding the filing of the claim. I.R.C. § 6511(b)(2)(B). These limitations periods cannot be waived. *United States v. Dalm*, 494 U.S. 596, 602 (1990).

Nevertheless, § 6511 of the Code only applies to payments of tax. *Rosenman v. United States*, 323 U.S. 658, 661-62 (1945); *Risman v. Commissioner*, 100 T.C. 191 (1993). Thus, any remittance other than a payment of tax may be returned to the taxpayer even if the taxpayer did not request its return within the time prescribed in § 6511. *Rosenman v. United States*, 323 U.S. at 661-62.

In general, a remittance is not regarded as a payment of tax until the taxpayer intends that the remittance satisfy what the taxpayer regards as an existing tax liability. *See id.* at 661-62. A majority of courts have held that a remittance is a payment, regardless of whether or not the tax has been assessed, when there is a concomitant recognition of a tax obligation by the taxpayer. *See, e.g.*, *Moran v. United States*, 63 F.3d 663 (7th Cir. 1995); *Ewing v. United States*, 914 F.2d 499, 503 (4th

Cir. 1990); *Ameel v. United States*, 426 F.2d 1270, 1273 (6th Cir. 1970); *Crosby v. United States*, 889 F. Supp. 148 (D. Vt. 1995);

Risman v. Commissioner, 100 T.C. at 191. Nevertheless, a few courts interpret *Rosenman* to mean that a remittance made prior to assessment is not a payment of tax *per se* (the *per se* rule). *See, e.g., Thomas v. Mercantile National Bank*, 204 F.2d 943, 944 (5th Cir. 1953); *United States v. Dubuque Packing Company*, 233 F.2d 453, 460 (8th Cir. 1956).

As discussed in your memorandum, some courts consider the factual circumstances associated with the remittance, including the taxpayer's intent at the time they filed the Form 4868, and the manner in which the Service treated the remittance, when determining whether the remittance represents a payment or a deposit. *See, e.g., Risman v. United States*, 100 T.C. 191 (1993), AOD CC-1997-006 (May 5, 1997); *Blatt v. United States*, 34 F.3d 252 (4th Cir. 1994); *Ewing V. United States*, 914 F.2d 499, *cert. denied*, 500 U.S. 905 (1991); *Zeier v. United States*, 80 F.3d 1360 (9th Cir. 1996); *Moran v. United States*, 63 F.3d 663 (7th Cir. 1995).

A recognized exception to either the *per se* rule or the facts and circumstances approach is that the remittance will be treated as a payment of tax whenever Congress has so mandated. *Gabelman v. Commissioner*, 86 F.3d 609 (6th Cir. 1996)(Form 4868 remittance), *aff'g,* T.C. Memo. 1993-592; *Ehle v. United States*, 720 F.2d 1096 (9th Cir. 1983)(withheld wages); *Nunziato v. United States*, 78 AFTR2d 96-5066 (D. Mass. 1996)(Form 4868 remittance); *England v. United States*, 760 F. Supp. 186, 187-88 (D. Kan. 1991)(estimated tax); *Batton v. United States*, 60 AFTR2d 87-5983 (D. Md. 1987)(same); *Beuhler v. United States*, ___ AFTR2d __-_____ (W.D. Tex. 1998)(same); *but see Harden v. United States*, 76 AFTR2d 95-7980 (5th Cir. 1995)(a remittance sent with a Form 4868 is not a payment of tax under the *per se* rule).

In *Gabelman*, the Court of Appeals for the Sixth Circuit noted that, although Congress and the Service have given taxpayers latitude in filing their returns, the law expressly prohibits an extension of time for the payment of tax. 86 F.3d at 612; *see also*, I.R.C. §§ 6151(a) and 6072(a); *Crocker v. Commissioner*, 92 T.C. 899 (1989). Thus, the court found that individual taxpayers requesting an extension of time to file their returns were required to remit "the amount properly estimated as tax" when filing their completed Form 4868. *Gabelman v. Commissioner*, 86 F.3d at 611-12. The court, therefore, concluded that, "the taxpayers retained their duty to submit a payment with their Form 4868." *Id.* at 612. Thus, the court held that a remittance sent with a Form 4868 is a payment of tax under the unambiguous language of the Internal Revenue Code and the regulations thereunder. *Id.* at 612; *see also Nunziato v. United States*, 78 AFTR2d 96-5066 (D. Mass. 1996).

[1] We note, however, that the *Harden* court was apprehensive about the court's analysis in *Thomas* and invited *en banc* reconsideration of the issue. Nevertheless, just as it had done in *Ford*, the full Court of Appeals for the Fifth Circuit denied the government's motion for reconsideration with a suggestion of *en banc* review in *Harden*. Although the government disagrees with the holding in *Harden*, it did not request Supreme Court review in that case.

[2] In *Thomas* and *Ford*, the taxpayers received statutory notices of deficiency from the IRS notifying them that they had underpaid their tax liabilities. In both cases, the taxpayers remitted the amounts due prior to the time the Service formally assessed such amounts. When the taxpayers later filed claims for refund, the issue that arose in both cases was whether the period of limitations for filing claims for refund began to run as of the earlier date when the taxpayers remitted payment of the deficiencies or, alternatively, as of the later date when the Service formally assessed the amounts of the deficiencies. The Court of Appeals for the Fifth Circuit held that the period of limitations began to run when the assessment was made because, under *Rosenman*, there is no payment of tax