

TAX MANAGEMENT

MEMORANDUM

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Protective Refund Claims: Preserving Tax Refunds Arising from Pending Tax Litigation

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INTRODUCTION

Pending tax litigation can present taxpayers with significant tactical and strategic challenges in preserving any potential refund claim. For example:

- A taxpayer seeking to avoid the expense, stress and distraction of litigation may deliberately take a conservative tax return position on a particular issue knowing that the Internal Revenue Service (the “Service”) is currently litigating the same issue with another taxpayer, but may wish to obtain a refund if the Service ultimately loses that litigation;
- After filing a tax return, a taxpayer may become aware of pending litigation that would support a tax refund if the Service loses the case; or

- A taxpayer that is a party to pending tax litigation involving a timing or loss suspension issue may be entitled to a refund for a subsequent year if the pending litigation is resolved against the taxpayer.

In an ideal world, such taxpayers would postpone their decision on whether to file a refund claim until the final resolution of the pending litigation so that they could determine the likelihood of success of their potential refund claim. Unfortunately, the statute of limitations for filing refund claims under §6511 may expire before the pending litigation, including any appeal, is fully resolved.¹

A taxpayer finding itself in one of the above situations should consider filing a refund claim that is contingent on the outcome of the pending litigation, commonly known as a “protective refund claim” or “protective claim.” The filing of such a claim may be attractive because, depending on the outcome of the litigation, the taxpayer may abandon its refund claim or, alternatively, the Service may aban-

¹ Unless otherwise indicated, all section references herein are to the Internal Revenue Code, as amended, or to the Treasury regulations promulgated thereunder. Section 6511(a) generally requires a taxpayer to file a claim for refund by the latter of (i) three years from the date the return was filed or (ii) two years from the date the tax was paid.

don its litigation position and issue a refund that previously would have been denied. In other words, the taxpayer's use of a protective refund claim may avoid unnecessary litigation — thereby benefiting both the taxpayer and the Service.²

The remainder of this article is divided into four sections. The first section discusses how taxpayers are able to use protective refund claims to preserve their right to file a refund suit while awaiting the results of pending tax litigation. The second section describes how recently-proposed estate tax regulations authorize the use of protective refund claims to preserve an estate's ability to claim a deduction for an unmatured claim. The third section addresses a potential trap for the unwary relating to the possible running of the non-Code statute of limitations during the time period in which a protective refund claim is held in abeyance. The final section provides some practical advice on how to handle protective refund claims and the statute of limitations problem.

PROTECTIVE REFUND CLAIMS

Until the issuance of the 2007 proposed estate tax regulations, discussed below, neither the Code nor the Treasury regulations specifically authorized a taxpayer to file a protective refund claim that was contingent on the outcome of pending litigation,³ and the Service has never formalized a procedure for filing such a claim.⁴ Nevertheless, it is well established that, in situations where the statute of limitations is likely to expire prior to the resolution of a future event, a taxpayer may file a refund claim that is contingent on the outcome of that event.⁵ In this regard, the Internal Revenue Manual (the "IRM") contains the following description of protective claims:

Protective Claims are formal claims or amended returns for credit or refund normally based on expected changes in a:

- Current IRC section
- Current Regulation

² If the taxpayer plans to pursue its refund regardless of the outcome of the litigation, then the taxpayer should consider filing a regular refund claim or adding language to the protective claim stating that the taxpayer plans to pursue its refund regardless of the litigation's outcome. See *Sun Chem. Corp. v. U.S.*, 698 F.2d 1203 (Fed. Cir.), cert. denied, 464 U.S. 819 (1983).

³ See *Pickett v. U.S.*, 90-2 USTC ¶60,030 (N.D. Fla. 1990); CCA 200547011.

⁴ *Pickett*, fn. 3, above; SCA 199941039.

⁵ See, e.g., *Frontier Chevrolet Co. v. U.S.*, 98 AFTR2d 2006-7321 (D. Mont. 2006); *Hindes v. U.S.*, 371 F.2d 650, 653 (5th Cir.), cert. denied, 386 U.S. 992 (1967); *Kellogg-Citizens Nat'l Bank of Green Bay, Wis. v. U.S.*, 330 F.2d 635, 639 (Ct. Cl. 1964); SCA 199941039.

- Pending legislation or

- Current litigation

These claims are filed to protect the claimant's right to recover internal revenue tax before the expiration of the statute of limitations.⁶

Because there is no formal procedure for filing a protective refund claim, in practice, the normal refund procedures are followed except that "Protective Claim" is written at the top of and the contingencies are disclosed somewhere on the appropriate form.⁷ Care should be given in drafting the contingencies set forth in the protective claim particularly if the taxpayer wants to preserve its right to file a refund suit prior to the resolution or regardless of the outcome of the contingency.⁸ Although not required, it would be advisable to include a cover letter indicating that the protective claim is being filed because the statute of limitations is set to expire and requesting that the Service hold the protective refund claim in abeyance pending the outcome of the contingency.

According to the Treasury regulations governing refund procedures, a refund claim (whether protective or regular) must:

1. be timely filed;
2. be filed with the Service Center in the District in which the tax was paid;
3. set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Service of the exact basis for the claim;
4. be verified by a written declaration that is made under penalties of perjury;
5. be filed on the proper form; and

⁶ IRM 21.5.3.4.7.3 (10-01-2002). See also IRM 4.10.8.9.4.1 (8-11-2006); IRM 4.75.4.7.5 (2-01-2003); IRM 25.6.6.5.5 (5-17-2004).

⁷ For refunds of federal income taxes, the appropriate form would be IRS Form 1040X (individuals) and Form 1120X (corporations). Claims for refund of certain other taxes, including estate and gift taxes, are made on Form 843.

⁸ See *Sun Chem. Corp. v. U.S.*, 698 F.2d 1203 (Fed. Cir.), cert. denied, 464 U.S. 819 (1983).

6. in the case of income, gift, and federal unemployment taxes, be made in a separate claim for each type of tax and for each taxable period or year.⁹

Internal IRS procedure provides that Service personnel should forward all protective claims that satisfy the above requirements to the appropriate area office or Operations Manager, Examination and that the protective claim should be held in suspense.¹⁰

Judicial Authorization of Protective Refund Claims

The leading case addressing protective refund claims is *U.S. v. Kales*.¹¹ In that case, the taxpayer purchased 525 shares of Ford Motor Co. stock prior to March 1, 1913, the valuation date for determining the tax basis of previously-acquired assets. In anticipation of selling the stock, the taxpayer obtained a ruling from the Commissioner that determined the value of the stock on March 1, 1913, to be \$9,489 per share (the “1919 Ruling”). Subsequently, the taxpayer sold the stock for \$12,500 per share and reported the gain on her 1919 income tax return. A newly-appointed Commissioner (the “New Commissioner”) disagreed with the 1919 Ruling; however, and in March 1925 the New Commissioner made a jeopardy deficiency assessment. On March 24, 1925, the taxpayer paid the additional tax and filed a written protest dated March 23, 1925, contending that the New Commissioner was not authorized to set aside the 1919 Ruling. In that protest, the taxpayer also stated that “‘if for any reason a revaluation shall be had,’ she ‘will insist’ that the stock was greatly undervalued by the Department and ‘will claim the right to a refund’ of the excess tax collected.”

The taxpayer filed a claim for refund, brought suit in district court, and then secured a judgment equal to

⁹ Regs. §§301.6402-2(a)(1), (a)(2), (c), (d) and -3(a)(1). See also CCA 200736027; Rev. Proc. 2006-54, 2006-49 I.R.B. 1035, §9.02. Notwithstanding the fifth requirement, many courts have allowed taxpayers to file “informal” claims for refunds without using the proper form. See, e.g., *U.S. v. Kales*, 314 U.S. 186 (1941). In many of those cases, the informal claim also qualified as a protective claim allowing the taxpayer to amend the claim after the occurrence of a contingency.

¹⁰ IRM 4.19.16.1.1 (11-02-2007); IRM 21.5.3.4.7.3.2 (10-01-2007). The principal GCM addressing protective claims contingent on pending litigation, discussed in detail below, provides that the Service has discretion in determining how to process a protective claim. GCM 38786 (Aug. 13, 1981). Nevertheless, the GCM also indicates that when the contingency in the protective claim is pending litigation that may have a substantial impact on the decision of whether to allow the claim, the Service will generally not act on a protective claim until the litigation is resolved.

¹¹ 314 U.S. 186 (1941).

the full amount of the jeopardy assessment plus interest. In the meantime, the Board of Tax Appeals determined in a separate case that Ford Motor stock had a value of \$10,000 per share on March 1, 1913. Therefore, on September 24, 1928, the taxpayer filed a formal claim (amending an “informal” claim) for a refund of taxes paid in 1919. The district court dismissed the suit on motion. However, the Circuit Court of Appeals reversed on the grounds that the March 23, 1925 protest letter was a timely-filed informal claim for refund which was perfected by the formal claim filed in September 1928. Therefore, the Court of Appeals held that the cause of action was not barred by the statute of limitations.¹²

In the process of affirming the Court of Appeals, the U.S. Supreme Court first recognized the validity of informal claims. The Supreme Court stated that:

A notice fairly advising the Commissioner of the nature of the taxpayer’s claim, which the Commissioner could reject because too general or because it does not comply with formal requirements of the statute and regulations, will nevertheless be treated as a claim where the formal defects and lack of specificity have been remedied by amendment filed after the lapse of the statutory period.¹³

After determining that the informal claim was proper, the Court focused on the contingent nature of the March 23, 1925 protest letter. The Court found that within the protest letter the taxpayer asserted that she had a right to a refund of taxes in the event the 1919 appraisal of the stock was set aside or determined to be erroneous.

According to the Court “whether the Commissioner would insist upon changing the 1919 appraisal of her stock, and whether in any case the Board of Tax Appeals would find a different 1913 value for the stock, were matters for future determination.” Next, the Court authorized protective claims by stating that “[t]he statement that upon the happening of the contingency the claim will be prosecuted is not inconsis-

¹² The Court of Appeals also held that the previous refund obtained by the taxpayer did not preclude the recovery.

¹³ 314 U.S. at 194. Subsequent decisions have set forth three requirements for informal claims. According to those decisions, an informal claim must (i) be in writing or at least contain a written component, (ii) adequately apprise the Service that a refund is sought for certain years, and (iii) give the Service enough information so that it can begin to examine the claim. See, e.g., *Malonek v. U.S.*, 923 F. Supp. 1462, 1466 (D. Wyo. 1996). Courts have also held that it is not enough that the Service have “information from which it might deduce that the taxpayer is entitled to, or might desire, a refund.” *Mills v. U.S.*, 890 F.2d 1133, 1135 (11th Cir. 1989).

tent with the present assertion of it.”¹⁴ Subsequent courts have followed the Supreme Court by allowing protective claims in contingent refund situations.¹⁵ In fact, several courts have stated that a taxpayer who does not file a timely protective refund claim may be prevented from later filing a refund claim due to the statute of limitations.¹⁶

Protective Refund Claims Contingent on Pending Tax Litigation

A review of existing authority produced several cases indirectly addressing the validity of refund claims that were contingent upon the outcome of pending tax litigation.¹⁷ In one such case, upon learning of pending litigation, “[the] petitioner filed an amended return, Form 1040X, which was labeled by petitioner as a ‘Protective Claim’ on July 19, 1988.”¹⁸ In that claim, the petitioner requested a refund in the event that the pending litigation was decided against the government.¹⁹ Although the issue was not directly addressed by the court, the petitioner’s claim apparently qualified as a valid protective claim.

Further support for protective refund claims based on pending litigation can be found in GCM 38786 (Aug. 13, 1981). In that GCM, the Director of Returns Processing and Accounting Division submitted three questions to the Assistant Commissioner regarding protective claims. The second question submitted, which is of particular relevance, asked:

If a “protective” (i.e., incomplete) claim is acceptable, how long does the taxpayer have to perfect the claim in the case of (a) an issue involving litigation or (b) a taxpayer who needs more time to gather necessary information?

¹⁴ 314 U.S. at 196.

¹⁵ See *Swietlik v. U.S.*, 779 F.2d 1306 (7th Cir. 1985); *Axtell v. U.S.*, 860 F. Supp. 795 (D. Wyo. 1994).

¹⁶ See, e.g., *Swietlik*, 779 F.2d at 1307.

¹⁷ See, e.g., *Frontier Chevrolet Co. v. U.S.*, 98 AFTR2d 2006-7321 (D. Mont. 2006) (indicating that pending litigation is one reason why taxpayers file protective claims); *Kellogg-Citizens Nat’l Bank of Green Bay, Wis. v. U.S.*, 330 F.2d 635, 638-39 (Ct. Cl. 1964) (same).

¹⁸ *Baratelli v. Comr.*, T.C. Memo 1994-484.

¹⁹ The petitioner’s protective claim stated: “Three cases involving the same or similar issues are set for hearing in the U.S. Tax Court in New York City September 26, 1988. If these cases are resolved in favor of the taxpayers, then the service should make refund based on the findings of the Court.”

The Assistant Commissioner’s response to the first half of the question is worth quoting at length:

With respect to protective claims relating to issues pending in litigation, we assume that the taxpayer has not filed all the information needed to support its claim because it is apparent from the Government’s litigating position that the taxpayer’s refund claim would be disallowed. The claim is submitted as a “protective” claim because the taxpayer wants to avoid the burden of submitting all supporting evidence until the strength of its claim is clarified by the pending litigation. If the Government prevails in the litigation, the taxpayer may abandon its claim. If on the other hand, the Government loses in the litigation, the Service may abandon its position and decide to issue refunds that it previously would have denied.

When the results of pending litigation may significantly clarify whether a refund should be allowed, the interests of both the Service and the taxpayer may be served by delaying action on the claim. If the Service were instead to act quickly and disallow the claim, the taxpayer might be compelled to file a refund suit at an earlier time because section 6532(a) provides for a limitations period of two years from the date the claim is disallowed. When there is a substantial possibility that the pending litigation will resolve whether the taxpayer is entitled to a refund, we see no reason why action on the claim should not be delayed as long as reasonably possible. Thus, we believe that such a “protective” claim may be held in abeyance until the pending litigation is resolved.

In a 1999 Service Center Advice (the “1999 SCA”), the Service restated its position regarding protective claims contingent on pending litigation.²⁰ In doing so, the Service noted that a “protective claim need not state a particular dollar amount or demand an immediate refund.” Instead, to be valid, a protective refund claim must:

- (i) identify and describe the contingencies affecting the claim;
- (ii) be sufficiently clear and definite to alert the Service as to the essential nature of the claim; and
- (iii) identify a specific year or years for which a refund is sought.

²⁰ SCA 199941039.

The 1999 SCA also indicated that, although the Service has discretion in determining how to process a protective claim, the Service will generally not act on a protective claim until the pending litigation or contingency is resolved.²¹

PROPOSED ESTATE TAX REGULATIONS

As previously noted, proposed estate tax regulations were issued in April 2007 that specifically authorize an estate to file a protective refund claim if there are pending claims against the estate.²² Under §§2031 and 2032, the value of an asset for federal estate tax purposes is determined as of the date of death or, if an appropriate election is made, the earlier of the date six months after the date of death or the date the asset is distributed or disposed of (the “alternate valuation date”).²³ Section 2053 provides that certain expenses and claims against the estate are deductible for estate tax purposes. Unlike §§2031 and 2032, §2053 is silent as to the date upon which the value of claims and expenses is to be determined. Furthermore, it is unclear whether post-death events should be taken into account in determining the available deductions under §2053. Thus, for example, if the decedent was the defendant in a lawsuit at the time of his death and the estate later prevails in the suit after the decedent’s death, it is unclear whether any deduction should be allowed under §2053. Two separate lines of authority have developed regarding this issue.²⁴ One line allows the estate to claim a deduction for the estimated value of the claim on the date of death; while, the other allows a deduction for the amount that is actually paid to satisfy the claim.

According to the Preamble, the proposed regulations were issued to clarify the §2053 deduction available to estates in an attempt to achieve uniform treatment of such expenses in all jurisdictions and to reduce costly disputes over the value of contingent

²¹ See also CCA 200547011; GCM 38786 (Aug. 13, 1981) (holding that “if the Service chooses to delay action on a refund claim, it is doing so because of the great discretion it has in deciding how to handle refund claims” and that “[t]here is no provision . . . requiring the Service to expeditiously act on such a claim or prohibiting it from doing so”).

²² See Prop. Regs. §§20.2051-1, 20.2053-1, 20.2053-3, 20.2053-4, 20.2053-6, 20.2053-9, 20.2053-10, REG-143316-03, 72 Fed. Reg. 20080 (4/20/07).

²³ In the interest of efficiency, the balance of this article will refer to the “date of death” value of assets and claims, without mentioning the alternate valuation date.

²⁴ See, e.g., *O’Neil v. U.S.*, 258 F.3d 1265 (11th Cir. 2001) (discussing the split of authority on this issue).

claims.²⁵ Under the proposed regulations, an estate generally is not permitted to claim deductions on its return for contested or unmatured claims. Instead, the estate is eligible for a refund based on the amount it actually pays to settle the claim.²⁶ An obvious potential problem with denying a deduction for a contested claim until it is paid is that the statute of limitations for filing a refund claim may expire before the claim is actually paid. The proposed regulations anticipate this issue by providing that:

A protective claim for refund may be filed before the expiration of the period of limitations for claims for refund in order to preserve the estate’s right to claim a refund once the claim against the decedent’s estate is matured and is paid or may be estimated as provided in §20.2053-1(b)(4). Although the protective claim need not state a particular dollar amount or demand an immediate refund, the protective claim must identify the outstanding liability or claim that would have been deductible under §2053(a) had it already been paid, and must describe the reasons and contingencies delaying actual payment of the liability or claim. Action on protective claims will proceed after the executor has notified the Commissioner that the contingency has been resolved.²⁷

The 2007 proposed estate tax regulations represent a significant development for taxpayers filing protective refund claims both in the estate and pending tax litigation context in that the regulations represent the Service’s most definitive position on the validity and requirements of such claims.²⁸

SIX-YEAR STATUTE OF LIMITATIONS

A taxpayer filing a protective claim should be aware of the risk that, even if the Service follows internal procedure for protective claims and does not mail a notice of disallowance, the taxpayer’s refund suit may become “time-bared” between the date the protective claim is filed and the date the pending litigation is finally resolved. Section 6532 provides that no suit for refund can be filed with a court (i) before six months from the date of filing a claim for refund, or (ii) after two years from the date the Secretary

²⁵ Preamble to REG-143316-03.

²⁶ Prop. Regs. §20.2053-4(b)(1).

²⁷ *Id.*

²⁸ See also Rev. Proc. 2006-54, 2006-49 I.R.B. 1035, §9.02 (addressing the requirements of protective claims in the competent authority context).

mails, by certified or registered mail, the taxpayer a notice of disallowance. However, §6532 does not specifically address the situation where, for whatever reason, the Service delays mailing (or never mails) the taxpayer a notice of disallowance. In Rev. Rul. 56-381,²⁹ the Service ruled that the statute of limitations under the Code does not run while the Service is considering a request for a refund. Nevertheless, the courts that have considered the issue are “split” on whether non-Code statutes, i.e., 28 USC §2401 (District Court) and 28 USC §2501 (Court of Federal Claims), impose an “outer limit” on suits for tax refunds.³⁰

In *Detroit Trust Co. v. U.S.*,³¹ the Court of Claims held that a taxpayer’s refund suit was timely despite the fact that it was filed almost 30 years after the claim for refund was originally submitted because it was brought within two years from the date the Commissioner disallowed the claim for refund. In that case, the taxpayer filed a claim for refund on October 8, 1923, the taxpayer amended the claim on February 27, 1948, and the Service denied the claim on July 27, 1951.³² After the denial, the taxpayer initiated a suit for refund on July 24, 1953.³³ The Court of Claims held that the suit was timely, reasoning that §3772 of the Internal Revenue Code of 1939 (the “1939 Code”)³⁴ governed the statute of limitations for tax refunds and that the six-year statute of limitations under 28 USC §2501 was not applicable.³⁵ In so holding, the court stated that “any delay in the settlement of the claim up to this date was caused by the action of the Commissioner in not rejecting the claim at an earlier date.”³⁶

Notwithstanding the above holding and the seemingly clear statutory language, in *Finkelstein v. U.S.*,³⁷ the government argued, and the district court agreed

in an alternative holding, that the six-year statute of limitations generally applicable to claims against the government (28 USC §2401) runs while the Service is considering a taxpayer’s refund claim relating to a deposit in the nature of a cash bond. In that case, the taxpayer filed a claim for refund, the taxpayer received notice through her attorney that the Service had disallowed the claim, and the taxpayer filed suit in district court more than two years after the date the claim was disallowed.³⁸ The taxpayer argued that her refund suit was timely because the notice of disallowance had not been sent to her by registered or certified mail.³⁹ The district court held against the taxpayer, finding that “actual notice” cured any defect in the manner of delivery.⁴⁰ The court also noted, however, that there is a six-year statute of limitations on all claims against the government, which begins to run on the date the cause of action first accrues.⁴¹ Because a taxpayer is entitled to bring a lawsuit against the government to compel payment of a refund claim six months after the refund claim is filed, regardless of whether the government has acted on the claim, the court held that the six-year statute of limitations began six months after the taxpayer submitted the refund claim.⁴² Accordingly, the taxpayer’s lawsuit, which was filed more than six and one-half years after the taxpayer filed the claim for refund, was barred by the statute of limitations.⁴³

Taxpayers with more sympathetic facts may be tempted to dismiss the *Finkelstein* decision as simply a court holding against a taxpayer with bad facts. Others may question the court’s analysis — noting that the case addressed the refund of a deposit in the nature of a cash bond, the statute of limitations holding appears to be dicta, and the holding seems to be inconsistent with the prior holding in *Detroit Trust* and the Services’ position in Rev. Rul. 56-381. Nevertheless, the *Finkelstein* decision cannot be completely ignored because the decision has been cited favorably by a subsequent court⁴⁴ and has been discussed by

holding. In *Kreider*, the Supreme Court held that a tax refund suit brought more than two years after the Secretary issued a notice of disallowance but within six years of the taxpayer filing a claim for refund was time barred because tax refunds are governed by the two-year statute of limitations in the Code and the six-year statute of limitations merely imposes an “outside limit” on suits against the United States.

²⁹ 1956-2 C.B. 953.

³⁰ Compare *Finkelstein v. U.S.*, 943 F. Supp. 425 (D.N.J. 1996), with *Detroit Trust Co. v. U.S.*, 130 F. Supp. 815 (Ct. Cl. 1955).

³¹ 130 F. Supp. 815 (Ct. Cl. 1955). See also *Consolidated Edison Co. v. U.S.*, 135 F. Supp. 881 (Ct. Cl. 1955) (holding that a taxpayer has two years from the date the Service mails the taxpayer a notice of disallowance to file a refund suit and that the six-year statute of limitations under 28 USC §2501 is not applicable despite the fact that the taxpayer could have filed a refund suit six months after filing the refund claim); *Klein Bancorporation, Inc. v. Comr. of Revenue*, 581 N.W.2d 863 (Minn. App. 1998).

³² 130 F. Supp. at 815-816.

³³ *Id.* at 816.

³⁴ Section 3772 of the 1939 Code is substantially similar to §6532 of the current Code.

³⁵ 130 F. Supp. at 817-18.

³⁶ *Id.* at 818.

³⁷ 943 F. Supp. 425 (D.N.J. 1996). The court cited to *U.S. v. A.S. Kreider Co.*, 313 U.S. 443, 447 (1941), for support of its

³⁸ 943 F. Supp. at 426-28.

³⁹ *Id.* at 430.

⁴⁰ *Id.* at 429-31.

⁴¹ *Id.* at 431-32.

⁴² *Id.* at 432.

⁴³ *Id.*

⁴⁴ *Goss v. U.S.*, 293 F. Supp.2d 816 (N.D. Ohio 2003) (holding that the six-year statute of limitations under 28 USC §2401(a) is

the Service in several recent administrative pronouncements.⁴⁵

CONCLUSION

If the statute of limitations under §6511 is about to expire for a tax year in which a taxpayer could be entitled to a refund depending on the outcome of pending litigation, then it may make sense to file a protec-

an outer limit and the plaintiff's tax refund suit that was commenced on June 17, 2003, was time barred because the plaintiffs could have started a refund suit on October 28, 1987, which was the date the IRS informed the taxpayer that it would pay the refund).

⁴⁵ See, e.g., 1998 IRS NSAR 5829, 1998 WL 1993209 (3/17/98) (discussing the split between the district courts and the Court of Federal Claims on the issue); 2000 IRS NSAR 11495, 2000 WL 34423449 (8/3/00) (discussing the split in authority regarding whether there is an outer limit on refund claims that have not been acted on by the Service); 2002 IRS NSAR 20037, 2002 WL 32167767 (1/30/02) (same). Cf. SCA 200202069 (discussing *Detroit Trust* and Rev. Rul. 56-381 but not *Finkelstein* to conclude that the statute of limitations does not begin until the Service mails the taxpayer a notice of disallowance).

tive claim that is contingent on the outcome of that pending litigation. The main advantage of filing a protective claim, as opposed to a regular claim, is that a taxpayer is able to wait for the results of the pending litigation without incurring the expense of preparing the case for trial. On the other hand, a taxpayer may prefer to file a "regular" refund claim if the taxpayer plans to file a suit for refund regardless of the outcome of the pending litigation. If a protective claim is filed, the taxpayer should explore whether it is possible to secure an agreement with the Service to suspend the running of the statute of limitation or file a suit for refund within six and one-half years after filing the protective claim (regardless of whether the pending litigation is resolved) to prevent any argument by the Service that the suit for refund is barred by the six-year statute of limitations under 28 USC §2401 and 28 USC §2501. If the six-year statute period has expired, the taxpayer should consider filing the refund suit in the Court of Federal Claims rather than in the federal district courts in order to take advantage of favorable precedent.