

Estate Planning
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From Howard M. Zaritsky
***56 TAX PAYMENT OR TAX DEPOSIT: THE DIFFERENCE CAN BE LARGE**
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Every practitioner who pays estate taxes, takes some comfort in the belief that, if the actual tax is ultimately found to be less than the amount paid, the overpayment will be refunded, usually with interest. The recent decision in Blom [\[FN1\]](#) demonstrates that refunds are conditioned upon a timely claim, and upon the fiduciary's decision whether to pay a tax or make a deposit in the nature of a cash bond.

Background

Helene Blom was executrix of the estate of her aunt, Helen Walbridge, who had died on 3/1/96. Ms. Walbridge's estate consisted of \$600,000 of assets owned by her personally, and \$400,000 of assets that had belonged to her late husband and that were held in a trust for her benefit. The executrix requested that the trustee transfer the trust assets to the executrix to be administered together with the decedent's personal assets, but the trustee (a local bank) declined to do so. Litigation ensued.

Eight months and 21 days after the decedent's death, the executrix visited an IRS office to inquire about an extension of time to file the estate tax return for her aunt's estate. The local office referred the executrix to the regional IRS office, where she then filed an 'Application for Extension of Time to File a Return' (Form 4768). The executrix tendered two checks with the Form 4768, one check in the amount of \$75,000 signed by the trustees of the trust and another in the amount of \$65,000 signed by the executrix. On one check, the executrix wrote 'Federal Estate Tax for Helen Walbridge.' The IRS accepted the checks in conjunction with the Form 4768.

The IRS granted the estate the requested extension, permitting the return to be filed by 6/1/97. The executrix, however, actually filed the return on 9/9/02, because she did not want to file the return until the estate litigation with the trust had been concluded.

The final return reflected that no estate taxes were due, and the IRS, while acknowledging the accuracy of the return, declined to issue the refund, claiming that the statute of limitations on refund claims had expired. [\[FN2\]](#) The taxpayer sued for the refund, and the IRS moved for a summary judgment. The executrix argued that she had intended the payment to be a 'deposit in the nature of a cash bond,' rather than a 'payment,' and that the statute of limitations does not apply to deposits.

'Payment' and 'deposit' distinguished

The U.S. District Court for the Eastern District of Pennsylvania held for the taxpayer, finding that the payment made with the Form 4768 was intended to be a deposit in the nature of a cash bond, rather than an actual tax payment. [\[FN3\]](#) The court explained that whether a remit-

tance made before the issuance of a notice of deficiency is characterized as a deposit, rather than a payment, is determined from all the relevant facts and circumstances. [\[FN4\]](#) This requires that the court look primarily at: (1) the timing of the remittance, (2) the intent of the taxpayer in making the remittance, and (3) how the IRS treated the remittance upon its receipt. [\[FN5\]](#)

In this case, the court explained, the IRS treated the remittance as a payment, but the executrix appeared genuinely to have intended that it *50 be a deposit. The court noted that the executrix made the payment without consulting a tax attorney or accountant to estimate the taxes owed, that she 'had not seriously thought about the potential tax liability prior to actually writing the check,' and that, as she confirmed in later letters to the IRS, 'her motivation in making the remittance was that no penalties be assessed against the estate due to untimeliness.' Therefore, the court concluded that the remittances were deposits, rather than payments, and that the statute of limitations had not run on their refund.

Conclusion

The best solution to the running of the statute of limitations on refund claims is to file one's refund claim within the statutory period. One can also, where appropriate, seek an extension of the time to pay tax, as well as an extension of the time to file the return. [\[FN6\]](#)

Generally, if the amount of the estate tax is likely to be disputed, the fiduciary should consider whether a remittance made before the tax has been determined should best be designated as a deposit or a payment. A deposit stops the running of statutory interest, and unless the collection of the tax is in jeopardy, will be returned upon request. [\[FN7\]](#) A fiduciary who wants a remittance to be treated as a deposit should so classify it in writing, preferably on the check itself.

One should be careful, however, that the deposit not constitute an unintentional choice of forum. A deposit made before the issuance of a 90-day letter may be deemed to eliminate the deficiency, and with it the right to bring suit in the Tax Court.

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[\[FN1\]](#). [97 AFTR2d 2006-2777, 2006 WL 1517393 \(DC Pa., 2006\)](#).

[\[FN2\]](#). [IRC Section 6511\(a\)](#), states, in applicable part, that: 'Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid.'

[\[FN3\]](#). See [Rosenman, 323 U.S. 658, 33 AFTR 314 \(S.Ct., 1945\)](#) (establishing distinction between 'payment' and 'deposit').

[\[FN4\]](#). See [Fortugno, 353 F.2d 429, 16 AFTR2d 5938 \(CA-3, 1965\)](#); and [Ertman, 165 F.3d 204, 207, 83 AFTR2d 99-733 \(CA-2, 1999\)](#). After a notice of deficiency, a remittance may be

designated as a 'deposit' instead of a 'payment' only by a writing. [Rev. Proc. 2005-18, 2005-13 IRB 798](#), superseding [Rev. Proc. 84-58, 1984-2 CB 501](#).

[FN5]. See [Rosenman, 323 U.S. at 661-663](#); [Ertman, 165 F.3d at 206](#); also see [Risman, 100 TC 191 \(1993\)](#) (remittance was a deposit where taxpayers made a wild guess at liability and tax commission initially coded remittance as deposit); [Hill, 263 F.2d 885, 887, 3 AFTR2d 1817 \(CA-3, 1959\)](#) (where 'a taxpayer gives the Government money in discharge of his tax debt or gives it money to stop interest and penalties while he and the Government contest what the debt is to be,' the remittance can be deemed a deposit). The court conceded that there is a body of law in other Circuits that an estimated payment filed with a Request for Extension is a 'payment' for purposes of tolling the statute of limitations. See, e.g., [VanCanagan, 231 F.3d 1349, 1354, 86 AFTR2d 2000-6458 \(CA-F.C., 2000\)](#); [Dantzler, 183 F.3d 1247, 1251, 84 AFTR2d 99-5586 \(CA-11, 1999\)](#); Deaton, TCM 2005-1. The court stated that these cases were 'distinguishable from the instant case.'

[FN6]. Section 6161(a)(2); Reg. 20.6161-1(a).

[FN7]. Sections 6601 and 6603.

33 Est. Plan. 56, 2006 WL 2423341 (W.G.&L.)

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