

RECENT REFUND CASE SHOWS PRIMACY OF TAX PROCEDURE

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Introduction

Many taxpayers have strong support for the positions they take on their returns, but their limited understanding of the complicated tax dispute procedures sinks them. Missing deadlines, using improper forms, sending materials to the wrong place, not getting all required signatures, and other errors can be deadly to taxpayers.

The IRS and its companion, the Department of Justice (“DOJ”) Tax Division, are hyper-aware of this reality. For this reason, they often attempt to claim victory and dispense with cases at the early stages based solely on technical and procedural matters, without ever having to engage in a fight over substance.

This article explains the penalties and unique mitigation standards applicable to information returns, describes the key aspects of tax refund actions, and analyzes recent cases, including *Special Touch Home Care Services, Inc.*, in demonstrating how confusion over tax procedures can lead to the loss of refunds.¹

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Penalties and mitigation standards

The IRS generally may assert penalties when a taxpayer does not file an information return, or files a late, incomplete, or incorrect one.² For these purposes, Forms W-2 (Wage and Tax Statement) and Forms W-3 (Transmittal of Wage and Tax Statements) are “information returns.”³ The unique rules concerning waiver of penalties for information returns are explained below.⁴

Lower penalties. The IRS may not assert penalties where the violation was due to “reasonable cause” and is not due to “willful neglect.”⁵ In this context, there is “reasonable cause” if *either* (1) there are significant mitigating factors with respect to the violation, *or* (2) the violation arose from events beyond the taxpayer’s control.⁶ In addition to meeting one of these two standards, the taxpayer must also show that he acted in a “responsible manner,” both before and after the violation.⁷

Significant mitigating factors. The regulations contain a non-exhaustive list of significant mitigating factors. Three are worth noting here. First, mitigation applies where the taxpayer was not previously required to file the particular type of return with respect to which the violation oc-

curred.⁸ Second, mitigation is appropriate where the taxpayer has a history of complying with the information-reporting requirement at issue.⁹ Finally, reasonable reliance on a qualified tax advisor might warrant mitigation.¹⁰

Events beyond the taxpayer's control. The regulations also contain a partial list of events that are beyond the taxpayer's control. Among such uncontrollable items are (1) unavailability of the relevant business records, (2) actions or inactions by the taxpayer's agent, after the taxpayer exercised reasonable business judgment in hiring the agent, and (3) failure by the payee or another person to provide information to the taxpayer.¹¹

With respect to the first item, the unavailability of relevant business records, the IRS will abate penalties when two criteria are met. First, the business records were unavailable under such conditions, in such a manner, and for such a period as to prevent the taxpayer from timely complying with the information-reporting requirements.¹² Second, a "supervening event" caused the unavailability of records. Importantly for purposes of this article, one of the events recognized by the IRS is the unavoidable absence, because of death or serious illness, of the person with the sole responsibility for filing the relevant returns.¹³

Acting in a responsible manner. Acting in a "responsible manner" means that the taxpayer exercised reasonable care, which is the standard of care that a prudent person would use under the circumstances in the course of its business in determining its filing obligations.¹⁴ It further means that the taxpayer undertook significant steps to avoid and mitigate the non-compliance, including requesting filing extensions where practicable, attempting to prevent any foreseeable problem, acting to remove the problem after it occurred,

and rectifying the non-compliance as promptly as possible once discovered.¹⁵

Higher penalties. The IRS may assert a higher penalty in situations where the non-compliance was due to "intentional disregard," that is, where a taxpayer "knowingly" and "willfully" failed to comply.¹⁶ In making this determination, the IRS must examine all the facts and circumstances in a particular case.¹⁷ These include, but are not limited to, whether the non-compliance was part of a pattern of bad conduct, the taxpayer swiftly corrected the situation upon discovering the non-compliance, and the amount of the penalties is less than the cost of complying with the rules, such that the taxpayer views penalties as simply a cost of doing business.¹⁸ Importantly, the IRS's own pronouncements indicate that it will only assert the higher penalty in extraordinary situations involving "flagrant abuses of the tax system" or where taxpayers "knowingly attempt to subvert the reporting requirements that are crucial to the functioning of our tax system."¹⁹

Key aspects of tax refund procedures

Taxpayers sometimes overpay their taxes and, well, they want their money back. Seeking a refund from the IRS is a surprisingly complicated process, as explained below.

Timeliness. The first step to recouping cash from the IRS is for a taxpayer to file a timely Claim for Refund.²⁰ A taxpayer normally must file a Claim for Refund within three years after filing the relevant tax return, or within two years after paying the relevant taxes, whichever period expires later.²¹ Practitioners often call these the "Three-Year Period" and the "Two-Year Period," respectively.

Recoverable amounts. Even if a taxpayer files a timely Claim for Refund, and even if he ultimately

¹ *Special Touch Home Care Services, Inc.*, 129 AFTR2d 2022-XXXX (DC NY, 3/7/2022).

² Section 6721(a); Reg. 301.6721-1(a)(1).

³ Reg. 301.6721-1(g)(2)(i).

⁴ The special rules in Section 6724 and the corresponding regulations are applicable to the information-reporting duties found in Section 6721 (covering certain "statements," "returns," and "other items"), Section 6722 (covering "payee statements"), and Section 6723 (covering other "specified information reporting requirements").

⁵ Section 6724(a); Reg. 301.6724-1(a)(1) and (2).

⁶ Reg. 301.6724-1(a)(2)(i) and (ii).

⁷ Reg. 301.6724-1(a)(2), Flush Language.

⁸ Reg. 301.6724-1(b)(1); See also IRM 20.1.7.9.1 (8/20/1998).

⁹ Reg. 301.6724-1(b)(2); Reg. 301.6724-1(b)(2)(i) and (ii).

¹⁰ IRM 20.1.7.9.1 (8/20/1998).

¹¹ Reg. 301.6724-1(c).

¹² Reg. 301.6724-1(c)(2).

¹³ Reg. 301.6724-1(c)(2); Reg. 301.6724-1(c)(2)(ii).

¹⁴ Reg. 301.6724-1(d)(1); I.R.M. 20.1.7.9.2 (11/16/2007).

¹⁵ Reg. 301.6724-1(d)(1); I.R.M. 20.1.7.9.2 (11/16/2007).

¹⁶ Section 6721(e); Reg. 301.6721-1(f)(2).

¹⁷ Reg. 301.6721-1(f)(2)(ii).

¹⁸ Reg. 301.6721-1(f)(3).

¹⁹ IRS Field Service Advisory, 1997 WL 33314303 (12/1/1997); IRS Field Service Advisory, 1992 WL 1354918 (7/8/1992).

²⁰ Section 6511(a).

²¹ Section 6511(a); Reg. 301.6511(a)-1(a).

²² Section 6511(b)(2)(A); Reg. 301.6511(b)-1(b)(i).

prevails, he can only recover certain amounts from the IRS. Strict rules exist in this regard. In particular, if the taxpayer files a Claim for Refund within the Three-Year-Period, the refund allowed will not exceed the amount of taxes paid during the three years immediately before the date on which the taxpayer filed the Claim for Refund, “plus the period of any extension of time for filing the return.”²² This is called the “Three-Year-Lookback-Period.” On the other hand, if the taxpayer files a Claim for Refund within the Two-Year-Period, the refund cannot surpass the taxes paid during the two years preceding the date on which the taxpayer filed the Claim for Refund.²³ This is the “Two-Year-Lookback-Period.” Below are a couple of illustrations.

A taxpayer normally must file a Claim for Refund within three years after filing the relevant tax return, or within two years after paying the relevant taxes, whichever period expires later.

Example #1. The normal deadline for filing the 2006 Form 1040 was 4/15/2007. Tommy Taxpayer did not request a six-month filing extension. Tommy paid the remaining tax liability for 2006 of \$25,000 when he filed his Form 1040 on 4/15/2007. As long as Tommy filed a Claim for Refund before 4/15/2010, he could be entitled to any amounts actually paid, or deemed to have been paid, between 4/15/2007 and 4/15/2010.

Example #2. The normal deadline for filing the 2006 Form 1040 was 4/15/2007. Tommy obtained an automatic six-month filing extension, moving the deadline to 10/15/2007. Tommy paid \$25,000 in taxes at the time he filed the extension request. Tommy filed his Form 1040 on the extended deadline of 10/15/2007. If Tommy filed a Claim for Refund by 10/15/2010, he could be entitled to all amounts paid in the previous three years, plus amounts paid during the six-month extension period. By obtaining a filing extension and then timely filing the Form 1040 within the extension period, Tommy essentially converted the Three-Year-Lookback-Period to a Three-

and-One-Half-Year-Lookback Period. Thus, Tommy could get refunds of amounts paid at any point between 4/15/2007 and 10/15/2010.

Contents of Claims for Refund. Claims for Refund, in addition to being filed with the IRS in a timely manner, must meet a long list of requirements. For instance, they must explain in sufficient detail the factual, legal, tax, and/or procedural grounds on which the taxpayer deserves a refund, contain a written declaration of accuracy made under penalties of perjury, utilize the correct form, address only one type of tax for one tax period, and be filed with the proper IRS Service Center.²⁴

Execution of Claims for Refund and related authorizations. As explained above, a Claim for Refund must contain several things, including a statement of grounds for the refund, “verified by a written declaration that it is made under penalties of perjury.”²⁵ The regulations warn that any Claim for Refund that fails to comport with this requirement “will not be considered for any purpose” as a Claim for Refund.²⁶

A taxpayer often executes his own Claim for Refund, but others can do so for him. This occurs, for instance, where an individual files his Form 1040, he later dies, and then the executor of his estate files a Claim for Refund.²⁷ This might also happen when an attorney or accountant for the taxpayer decides to complete and file a Claim for Refund for the taxpayer. The regulations allow such representatives to submit a Claim for Refund in certain circumstances, but caution that they must enclose a valid Form 2848 (Power of Attorney).²⁸

The Form 2848 contains explicit instructions in this regard. For starters, Line 5a on the front page of Form 2848 tells taxpayers to identify the specific acts their representatives are authorized to take, such as “sign a return.”²⁹ The corresponding instructions state that, “unless specifically provided in the [Form 2848], this authorization does *not* include . . . the power to sign returns.”³⁰ The instructions go on to clarify that, if a taxpayer wants to enable his attorney, accountant, enrolled agent, family member, or other representative to file a return

²³ Section 6511(b)(2)(B); Reg. 301.6511(b)-1(b)(ii).

²⁴ Section 6402(a); Reg. 301.6402-2.

²⁵ Reg. 301.6402-2(b)(1).

²⁶ Reg. 301.6402-2(b)(1).

²⁷ Reg. 301.6402-2(e).

²⁸ Reg. 301.6402-2(e); Reg. 1.6012-1(a)(5) (explaining that when an agent files a return for a taxpayer it must be accompanied by

a “properly completed” Form 2848 authorizing such agent to represent the taxpayer in preparing, executing, and filing the return).

²⁹ Form 2848 (Power of Attorney and Declaration of Representative) (Rev. January 2021), pg. 1.

³⁰ IRS Instructions for Form 2848 (Rev. January 2021), pg. 2 (emphasis added).

for him, including a Claim for Refund, he must check the proper box in Line 5a of Form 2848 and must execute Form 2848.³¹

Taxpayers curing defects. A taxpayer can file a Claim for Refund, later recognize its shortcomings, and then fix matters before the IRS has rendered a decision. The IRS explains that a taxpayer can remedy a defect by filing an Amended Claim for Refund, which, together with the materials in the original Claim for Refund, adequately describe the grounds for the refund and comply with all other requirements.³²

IRS waiving defects. Things can function the other way around, too. For example, instead of the taxpayer discovering flaws with the original Claim for Refund and swiftly “perfecting” it by filing an Amended Claim for Refund, the IRS can choose to overlook the deficiencies and process the original Claim for Refund anyway. The IRS has described situations in which that can occur:

If a refund claim does not contain a sufficient statement of grounds and facts indicating the basis of the claim, it will still be treated as a valid claim if the [IRS] considers the claim on its merits and is thereby deemed to have waived the defect. Similarly, if a claim is defective because it does not meet one of the other requirements set forth in the regulations (e.g., if the claim is on the wrong form), the [IRS] will be deemed to have waived the defect if it is clear that the [IRS] understood the particular claim advanced by the taxpayer and considered it.³³

Informal claims for refund. The courts have long held that an “informal” Claim for Refund will suffice, provided that it is in writing, includes a request for refund for specific periods, informs the IRS of the basis for the refund, and provides sufficient information to allow the IRS to examine the Claim for Refund.³⁴ The courts have recognized that informal Claims for Refund come in many varieties, including letters by taxpayers to the IRS, objections noted on the backside of checks to the IRS, and oral statements by taxpayers recorded by IRS personnel.³⁵

Filing suits for refund. If the IRS formally denies a Claim for Refund by issuing a Notice of Disallowance, the taxpayer can seek immediate help from the courts by initiating a Suit for Refund in the proper District Court or Court of Federal Claims (“Claims Court”).³⁶ The taxpayer can also file a Suit for Refund if the IRS simply ignores him, failing to respond to his Claim for Refund for at least six months.³⁷

Two more points are important here. First, the law mandates that a prerequisite to filing a Suit for Refund with the courts is the previous submission of a valid Claim for Refund with the IRS. It clarifies that taxpayers cannot file a Suit for Refund “until a claim for refund or credit has been *duly filed* with the [IRS].”³⁸ Second, before filing a Suit for Refund, the taxpayer generally must pay the entire amount in dispute.³⁹

Analysis of the newest case

Now that readers have a basic understanding of the foundational issues, we turn to the newest case highlighting refund-related problems, *Special Touch Home Care Services*.

Relevant facts. Special Touch Home Care Services, Inc. (“Company”) had a controller (“Controller”) who had been responsible for tax issues, including the filing of annual Forms W-2 and Forms W-3 with the IRS, since 1990. The Controller fulfilled his duties without incident for well over a decade. Unfortunately, the Controller contracted cancer, underwent initial treatment in 2013, and

Claims for Refund, in addition to being filed with the IRS in a timely manner, must meet a long list of requirements.

became seriously ill in 2015. The Controller worked reduced hours and was out of the office routinely during this period. The Controller, amid his medical challenges, failed to file Forms W-2 and Forms W-3 for the Company for 2015 and 2016.

The Company was unaware of this non-compliance by the Controller until July 2017, when the IRS sent a notice of proposed penalties. Shortly thereafter, the Company filed all delinquent Forms W-2 and Forms W-3 with the IRS, followed by a Penalty Abatement Re-

³¹ IRS Instructions for Form 2848 (Rev. January 2021), pg. 6.

³² IRS General Counsel Memorandum 38786.

³³ IRS General Counsel Memorandum 38786.

³⁴ See, e.g., *Kales*, 314 U.S. 186, 195 (1941); *Miller*, 949 F.2d 708, 711 (CA-4, 1991); *D’Amelio*, 679 F.2d 313 (CA-3, 1982).

³⁵ *Kales*, 314 U.S. 186, 195 (1941); *Crenshaw v. Hecke*, 237 F.2d 372 (CA-4, 1956); *Stevens*, 2007 WL 2556592 (N.D. Cal., 2007); General Counsel Memorandum 38786.

³⁶ Section 6532(a)(1); Reg. 301.6532-1(a); Section 7422(a); ne

³⁷ Section 6532(a)(1); Reg. 301.6532-1(a); Section 7422(a).

³⁸ Section 7422(a); Reg. 301.6402-2(a)(1) (emphasis added).

³⁹ *Flora*, 362 U.S. 145 (1960). See also *Rocovich*, 933 F.2d 991 (Fed. Cir., 1991) (explaining that payments made after the filing of a Suit for Refund will not rectify the issue).

quest in November 2017. The IRS partially denied this in February 2018 on grounds that the Company supposedly failed to show reasonable cause or due diligence. The denial letter by the IRS indicated that, in order to seek reconsideration by the Appeals Office, the Company would need to provide additional facts and evidence, an executed declaration under penalties of perjury that all statements in the Penalty Abatement Request were accurate, and an executed Form 2848, if the Company wished another party to represent it. The denial letter also explained that, instead of approaching the Appeals Office, the Company could simply pay the penalty under protest and then lodge a Claim for Refund.

The Company chose the latter option, hiring an attorney (“Attorney”) to prepare and file a Claim for Refund (*i.e.*, Form 843). The Attorney signed the Form 843 in the box designated for “return preparers” in July 2019. Such box does *not* have a portion declaring, under penalties of perjury, that the data in Form 843 was true, accurate, and complete. The Attorney attached to the Form 843 a Form 2848, signed by an employee of the Company, which did *not* specifically authorize the Attorney to file with the IRS a Claim for Refund or any other “return” for the Company.

tice of Allowance, Notice of Disallowance, or Notice of Partial Allowance. As shown below, because of procedural shortcomings by the Company, the DOJ never had to address the substantive issues either.

After waiting slightly more than one year, the Company, through its Attorney, filed a Suit for Refund with the District Court in July 2020. Approximately five months later, in December 2020, the Company filed an Amended Claim for Refund. An authorized representative of the Company executed it under penalties of perjury.

Positions of the parties. During the early stages of litigation, the DOJ, which generally handles Suits for Refund instead of the IRS, filed a Motion to Dismiss. The DOJ claimed that the District Court should dispense with the case because the Company never filed an appropriate Claim for Refund with the IRS in the first place.

The Company countered that the District Court had jurisdiction over the case because (1) the original Claim for Refund filed in July 2020 was proper, (2) the Company filed an Informal Claim for Refund, and (3) the Amended Claim for Refund filed in December 2020 cured any defects with the original Claim for Refund filed in July 2020. The Company also

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At first blush, it seems that the Company might have a strong position for penalty waiver. Referencing the unique rules for information returns described earlier in this article, the Company seemingly could have argued that (1) significant mitigating factors existed, including reasonable reliance on the Controller and a long history of timely filing Forms W-2 and Forms W-3 before the problems started in 2015, (2) the unexpected and life-threatening illness affecting the Controller was an event beyond everyone’s control, and (3) the Company acted in a responsible manner, as evidenced by the voluntary filing of all missing Forms W-2 and Forms W-3 with the IRS shortly after discovering the compliance problem.

The IRS never responded to the merits of the Claim for Refund; it did not issue a No-

suggested that dismissing the Suit for Refund now would cause judicial inefficiency in that the Company would be forced to file another Claim for Refund and essentially restart the process from scratch. The District Court rejected each of the Company’s arguments in order, as shown below.

First position—valid original claim for refund. The District Court explained that the original Claim for Refund had two defects. First, it was not executed under penalties of perjury, as specifically required by the regulations. Second, even if the Attorney, who executed the Claim for Refund as the “return preparer,” had executed it under penalties of perjury, she was not authorized to do so because of deficiencies with the Form 2848 that the Company granted her. The District Court pointed out that these types of problems are not new: “Courts that have con-

sidered similar defects have found that they are fatal to the submission of a duly filed [Claim for Refund] and thus insufficient to confer jurisdiction.”

With respect to the original Claim for Refund on Form 843, the District Court cited a number of earlier cases in which taxpayers failed to sign under penalties of perjury, and the courts dismissed the related Suits for Refund. The District Court also identified several cases ruling that, where attorneys file Claims for Refund for taxpayers, they must execute them under penalties of perjury. In concluding this topic, the District Court reasoned that the regulations “are clear about the requirement that Form 843 is filed under penalties of perjury” and there is “no reason why that requirement should differ where an attorney signs Form 843 on behalf of a taxpayer.” Neither the Company nor the Attorney signed the original Claim for Refund under penalties of perjury in *Special Touch Home Care Services*, so it was not “duly filed.”

Moving to Form 2848, the District Court explained the DOJ’s position that, even if the Attorney had executed the original Claim for Refund under penalties of perjury, she still lacked authorization to do so from the outset. The District Court referenced the regulation mandating that Claims for Refund filed by attorneys be accompanied by Forms 2848. Next, it recited the three arguments raised by the DOJ, all of which basically boil down to the fact that the Form 2848 did not expressly authorize the Attorney, or anyone else for that matter, to file a Claim for Refund for the Company.

The District Court emphasized that many courts demand strict compliance, as opposed to merely substantial compliance, with the Form 2848 requirements. In holding in favor of the DOJ, the District Court explained that the Form 2848 in *Special Touch Home Care Services* empowered the Attorney to address civil penalties related to Forms W-2, Forms W-3, and other information returns, but did not specifically allow the Attorney to file a Claim for Refund.

Second position—informal claim for refund. As explained earlier in this article, some taxpayers have been able to trigger jurisdiction on grounds that they filed, and the IRS accepted, an “informal” Claim for Refund. In *Special Touch Home Care Services*, the Company maintained that the Penalty Abatement Request that it submitted in November 2017 suf-

ficed. The District Court gave this argument little credence, pointing out that, in November 2017, the IRS had only *proposed* penalties, not *assessed* them, and the Company had not paid anything. Accordingly, the Company could not have filed a Claim for Refund, formal or informal, at that time.

Third position—amended claim for refund cures all. The Company contended that the District Court has jurisdiction over the Suit for Refund because the Amended Claim for Refund, filed in December 2020, “relates back” to the original Claim for Refund, filed in July 2019.



The regulations allow representatives to submit a Claim for Refund for a taxpayer in certain circumstances, but caution that they must enclose a valid Form 2848 (Power of Attorney).

The District Court pointed out, to the disappointment of the Company, that all the cases cited by the Company to support its position involved taxpayers filing proper original Claims for Refund, followed by Amended Claims for Refund. Here, in contrast, the situation involved an improper Original Claim for Refund (because of the problems with Form 843 and Form 2848). The District Court concluded that the “relation-back doctrine” only allows for tolling the statute of limitations in cases where it had jurisdiction in the first place; “it does not retroactively vest courts” with jurisdiction where it did not previously exist.

Fourth position—ignore rules for sake of efficiency. The Company, as a final effort, essentially asked the District Court to ignore the regulations and caselaw for purposes of saving the IRS, DOJ, Company, and District Court time and money. The Company pointed out that, because it filed a proper Amended Claim for Refund in December 2020, and because the IRS never responded, the Company could have filed a new Suit for Refund as early as July 2021, and whether the District Court had jurisdiction to resolve the case would never have been an issue. That might be true, acknowledged the District Court, but the IRS has the right to insist upon strict compliance with its regulations, and the Federal Rules of Civil Procedure demand dismissal of cases that lack jurisdiction, regardless of the impact on “judicial efficiency.”

Analysis of a similar case

One might think that the procedural missteps in *Special Touch Home Care Services* are an aberration, but that is not the case. Indeed, the Claims Court addressed a comparable situation just a few months before, in *Mattson*.⁴⁰ Similarities between the two cases exist, but analyzing both furnishes readers with additional insight into legal positions raised by parties, reasoning by the courts, errors to avoid, and more.

The law mandates that a prerequisite to filing a Suit for Refund with the courts is the previous submission of a valid Claim for Refund with the IRS.

Special rules for certain U.S. workers in Australia.

The Joint Defense Facility Pine Gap is a satellite surveillance base operated by the U.S. and Australian governments. In 1966, the two governments executed an agreement regarding various aspects of Pine Gap, including how U.S. individuals working there would be taxed (“Pine Gap Agreement”).⁴¹ The IRS and Australian tax authorities later developed procedures designed to alleviate tax compliance burdens for U.S. individuals working at Pine Gap. Such procedures allow U.S. individuals to avoid income taxes in Australia and the need to file tax returns in Australia. As a precondition to such benefits, taxpayers must sign a Closing Agreement with the IRS, which mandates that the U.S. individuals (1) will report on their annual Forms 1040 all income made at Pine Gap, (2) will not claim the foreign earned income exclusion (“FEIE”) with respect to such income, and (3) will enclose a copy of the Closing Agreement with their Forms 1040. The IRS emphasizes that if a taxpayer signs a Closing Agreement (to avoid Australian taxes on income earned at Pine Gap) and also claims the FEIE (to avoid U.S. taxes on income earned at Pine Gap), any refund issued by the IRS constitutes an “erroneous refund,” must be repaid, and could trigger penalties.⁴²

Main facts in the case. The taxpayers in *Mattson*, a married couple, lived in Australia and worked

for the Raytheon Company at Pine Gap. In connection with their employment, the taxpayers executed a Closing Agreement with the IRS in 2015, which specifically prohibited them from claiming the FEIE in connection with their work at Pine Gap.

In April 2017, the taxpayers filed their Form 1040 for 2016 and did *not* attempt to benefit from the FEIE. This was consistent with the terms of the Closing Agreement. Later, the taxpayers hired a U.S. law firm (“Law Firm”), which prepared a Claim for Refund, this time seeking tax benefits under the FEIE. The Claim for Refund maintained that, notwithstanding the Pine Gap Agreement and related Closing Agreement executed by the taxpayers, the IRS could not tax the Australian wages thanks to Article 19 of the tax treaty between the United States and Australia.⁴³

The taxpayers did not personally sign the Claim for Refund; only one attorney at the Law Firm did so. Moreover, the attorney did not enclose a Form 2848 with the Claim for Refund authorizing the attorney, or anyone else at the Law Firm, to sign and file the Claim for Refund.

In November 2018, the Law Firm sent the IRS a Form 2848 indicating that three of its attorneys were authorized to represent the taxpayers generally. The Form 2848 had a few problems, though. The taxpayers never signed the Form 2848; rather, one of the attorneys initialed it for them. Additionally, the Form 2848 failed to check the box on Line 5 indicating that the attorneys at the Law Firm had the power to “sign a return,” such as a Claim for Refund, for the taxpayers.

In April 2019, the IRS sent a Letter 569 to the taxpayers, which constituted a “preliminary” Notice of Disallowance. It indicated that the IRS “proposed to disallow” the Claim for Refund because the taxpayers were employees of the Raytheon Company in Australia, they might have entered into a Closing Agreement with the IRS waiving their right to claim the FEIE, and the Closing Agreement covers income paid by the Raytheon Company. The next month, May 2019, the Law Firm sent a let-

⁴⁰ *Mattson*, 127 AFTR2d 2021-1539 (Ct. Fed. Claims, 4/15/2021). For more information about this case, see Hale E. Sheppard, “Recent Case Highlights Convergence of Substance and Procedure in International Tax Disputes,” 32(7) *Journal of International Taxation* 39 (2021), republished in 135(2) *Journal of Taxation* 21 (2021).

⁴¹ Agreement between the Government of the Commonwealth of Australia and the Government of the United States of Amer-

ica relating to the Establishment of a Joint Defense Space Research Facility, Australian Treaty Series 1966 No. 17 (12/9/1966).

⁴² www.irs.gov/individuals/international-taxpayers/foreign-earned-income-exclusion-and-the-pine-gap-facility.

⁴³ Double Taxation on Income Convention between the United States of America and Australia (1983).

ter to the IRS seeking review by the Appeals Office of the Letter 569.

Soon thereafter, in July 2019, the Law Firm started a Suit for Refund with the Claims Court on behalf of the taxpayers. At some point *after* filing the Suit for Refund, the IRS issued the taxpayers a formal Notice of Disallowance of their Claim for Refund. The DOJ filed a Motion to Dismiss in March 2020, asking the Claims Court not to entertain the case any further because it supposedly lacked jurisdiction to do so.

Main positions of the parties. The DOJ took the position that the Claims Court lacked authority to hear the case because the taxpayers neither personally signed the Claim for Refund nor enclosed an appropriate Form 2848 with it. The taxpayers did not dispute those facts. Instead, they argued that the Claim for Refund was valid nonetheless because the IRS supposedly waived the technical problems when it examined the Claim for Refund. The taxpayers contended, alternatively, that they first filed an “informal” Claim for Refund and later perfected it.

Analysis by the Claims Court. The Claims Court held in favor of DOJ with respect to the following three arguments.

First argument—claims for refund and signing requirements. The Claims Court began by pointing to various tax provisions and regulations requiring a taxpayer to file a valid Claim for Refund as a precondition to filing a Suit for Refund, and emphasizing that execution of certain documents by the taxpayer is key. For instance, the Claims Court cited Section 7422, which states that taxpayers cannot file a Suit for Refund until after a Claim for Refund “has been duly filed with the [IRS], according to the provisions of law in that regard, and the regulations of the [IRS] established in pursuance thereof.”

The Claims Court then highlighted Section 6061, which generally states that any return, statement, or other document that must be filed with the IRS “shall be signed in accordance with the forms and regulations” created by the IRS.⁴⁴ Next, the Claims Court mentioned Section 6065, which demands that any return, declaration, statement, or other document required to be filed with the IRS “shall contain or be verified by a written declaration that it is made under the penalties of perjury.”⁴⁵

The Claims Court pointed out that when it comes to Claims for Refund, they “must be ver-

ified by a written declaration that is made under the penalty of perjury,” they must enclose a valid Form 2848, and the Form 2848 must reflect a “clear expression of the taxpayer’s intention concerning the scope of authority granted to the recognized representative(s).”⁴⁶ Finally, the Claims Court explained that several courts have previously examined the question of whether the IRS can waive the signature requirement for Claims for Refund and determined that it cannot do so because such obligation is statutory (*i.e.*, derived from legislation enacted by Congress), not regulatory (*i.e.*, derived from regulations or other administrative guidance issued by the IRS).

The Claims Court dispensed with the first argument by the taxpayers, applying the law described above. It concluded that “the undisputed facts in this case make it clear” that the taxpayers did not file a valid Claim for Refund, such that the Claims Court lacked jurisdiction.

Second argument—inapplicability of waiver doctrine. The Claims Court acknowledged that the Supreme Court has held that the IRS can waive certain deficiencies in a Claim for Refund by taking action on it, but it cannot ignore “statutory” requirements. The Claims Court then explained that the signature obligations relating to Claims for Refund are statutory in nature, not regulatory. The Claims Court went on to underscore that the tax provisions relevant in *Mattson* state that taxpayers “must,” “shall,” or “are required to” take particular actions, like personally signing Claims for Refund or expressly empowering representatives to do so on their behalf.

The Claims Court also pointed out that it had previously ruled that the signature duty is statutory and thus not susceptible to waiver by the IRS “in several cases that are essentially identical.”⁴⁷ Finally, as an homage to judicial precedent, the Claims Court explained that two different Courts of Appeals have arrived at the same conclusion.⁴⁸

Third argument—rejection of informal claim for refund. The fallback position for the tax-

⁴⁴ Section 6061(a).

⁴⁵ Section 6065; Reg. 1.6065-1(a).

⁴⁶ Reg. 301.6402-2(b)(1); Reg. 301.6402-2(e); Reg. 601.503(a)(6).

⁴⁷ Citing *Gregory*, 149 Fed. Cl. 719 (2020), *Brown*, 151 Fed. Cl. 530 (2020), and *Quattrini*, 127 AFTR2d 2021-1287 (Ct. Fed. Cl., 2021). See also *Hall*, 125 AFTR2d 2020-1849 (Ct. Fed. Cl., 2020), *Clark*, 126 AFTR2d 2020-5444 (Ct. Fed. Cl., 2020), and *Dixon*, 147 Fed. Cl. 469 (2020).

⁴⁸ *Mattson*, 127 AFTR2d 2021-1539 (Ct. Fed. Claims, 4/15/2021), footnote 4.

payers was that they filed a timely “informal” Claim for Refund with the IRS. The DOJ urged the Claims Court to discard that argument based on one critical issue, timing. The taxpayers could not benefit from the “informal” Claim for Refund, unless they had “perfected” it before the IRS issued its Notice of Disallowance, and thus before the start of a Suit for Refund. This clearly did not occur, as various documents that the taxpayers filed with the Claims Court indicated they intended to file “an amendment” to the Claim for Refund that “cures all defects.”

The Claims Court sided with the DOJ, explaining that it was not persuaded by the contention that the “informal” claim doctrine “re-

vived” the Claim for Refund because the taxpayers did not file an Amended Claim for Refund to correct the deficiencies before commencing the Suit for Refund.⁴⁹

Conclusion

This article shows that, while the penalty-waiver standards applicable to information returns are quite favorable to taxpayers, failure to obey all the complex procedural rules can lead to terrible results. *Special Touch Home Care Services, Inc.* illustrates that not properly signing a Claim for Refund, incorrectly completing a Form 2848 for a representative, not submitting a timely Amended Claim for Refund to perfect earlier deficiencies, and other blunders can deprive a taxpayer of his proverbial day in court, not to mention his money. ■

⁴⁹ *Mattson*, 127 AFTR2d 2021-1539 (Ct. Fed. Claims, 4/15/2021), footnote 4.