

Protective Claim for Refund Procedures for Section 2053 Claims or Expenses, Rev. Proc. 2011-48, 2011-42 IRB 527 (October 14, 2011)

Procedures for Filing Protective Claims for Refund and Subsequently Notifying IRS to Consider Refunds After Contingencies to Section 2053 Claims and Expenses Have Been Resolved; Procedures Critically Important For Estates With Claims or Expenses of Uncertain Amount

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Synopsis

The IRS issued final regulations in 2009, taking the general approach that a federal estate tax deduction is allowed for contingent or uncertain claims or expenses only as payments are actually made by the estate or when claims are “ascertainable with reasonable certainty” and “will be paid.” Treas. Reg. §20.2053-1(d)(4). A protective claim for refund can be filed for contingent or uncertain claims before the statute of limitations runs on refunds, and a deduction is allowed when the claim is resolved, even if that is after the general period of limitations on refunds has expired. Treas. Reg. §20.2053-1(d)(5). The preamble to the final regulations indicates that the IRS will issue further guidance regarding the process of using protective claims for refund. Two years later, we have received that guidance.

Revenue Procedure 2011-48, released on October 14, 2011, is critically important for estates with uncertain claims or expenses that cannot be deducted at the time the estate tax return is filed. Unless the procedures in this Revenue Procedure are followed, there will be *no ability* to deduct claims or expenses that are actually paid or resolved after the period of limitations on federal estate tax refunds has expired. Satisfying all of the detailed requirements in the Revenue Procedure is important for various reasons, including the ability to correct insufficient identification of claims and to limit the IRS from being able to review the entire estate tax return after the period of limitations on refunds has expired.

The procedures described in § 4 of Rev. Proc. 2011-48 for filing and processing the protective claim include the timing of filing the protective claim, who can file the protective claim (and documenting the authority of such person), two alternative methods for filing the protective claim (a separate filing is required for each separate claim), the required manner of specifically identifying of the particular claim or expense, the processing of a protective claim by the IRS (filing a protective claim does not delay the estate tax audit or issuance of a closing letter), the advisability of contacting the IRS if the filer does not receive acknowledgement from the IRS that it has received the protective claim within a specified period of time, and the opportunity to cure an inadequately identified claim or expense.

Procedures in § 5 of Rev. Proc. 2011-48 for giving “notification of consideration” of the claim after it has been paid or after contingencies have been resolved include procedures and time period for notifying the IRS, alternatives for “perfecting” the claim when multiple or recurring payments are part of the protective claim, who can perfect the claim if there is no longer an executor or personal representative for the estate, limits on reviewing other aspects of the estate tax return in considering the claim, and necessary adjustments to the marital and charitable deduction if the claim was paid from a charity or surviving spouse’s share of the estate.

Brief Background of Protective Claims for Refund Under § 2053 Regulations

The IRS issued final regulations on October 20, 2009, taking the general approach that a deduction is allowed for contingent or uncertain claims only as payments are actually made by the estate. This general rule does not apply to estimated amounts for claims that the IRS is satisfied are “ascertainable with reasonable certainty” and “will be paid.” Treas. Reg. §20.2053-1(d)(4). A protective claim for refund can be filed for contingent or uncertain claims before the statute of limitations runs on refunds, and a deduction is allowed when the claim is resolved, even if that is after the general period of limitations on refunds has expired. Treas. Reg. §20.2053-1(d)(5).

The § 2053 regulation briefly addressed protective claims for refund regarding § 2053 deductions. It identified issues involving timing of filing protective claims (before the statute of limitations runs on refunds), identification of claims (requiring a description of the reasons and contingencies delaying actual

payment of the claim but not requiring listing of actual amounts), and consideration of the claim after the contingency is resolved (requiring notification to the IRS “within a reasonable period that the contingency has been resolved”).

The regulations also address that the possibility of a contingent claim against an estate will not reduce the amount of marital or charitable deduction available on the estate tax return even if the contingency is payable out of a marital or charitable share. However, after the contingency is resolved and the amount is paid, the marital or charitable deduction will be reduced (but generally would be offset by the § 2053 deduction for that same amount). Treas. Reg. §20.2053-1(d)(5)(ii).

The preamble to the final regulations indicates that the IRS will issue further guidance regarding the process of using protective claims for refund. Two years later, we have received that guidance.

Summary of Procedures Under Rev. Proc. 2011-48

1. *Time Period For Filing Protective Claim.* The protective claim for refund may be filed at any time within the period of limitations for filing a claim for refund under §6511(a) (i.e., the later of three years after the return was filed or two years after the payment of tax). Rev. Proc. 2011-48, § 4.01.
2. *Who Can File Protective Claim?* There must be documentary evidence (such as certified copies of letters testamentary) of the authority of the person filing on behalf of the estate. If the same fiduciary that filed the Form 706 also files the protective claim for refund, a statement affirming that the person is still acting in a representative capacity will suffice. Rev. Proc. 2011-48, § 4.03.
3. *Alternative Methods of Filing Protective Claim for Refund.* For estates of decedents dying after 2011, two alternatives are available — (1) attaching Schedule PC to the Form 706 at the time of filing the estate tax return (Schedule PC will be part of the 2012 Form 706), or (2) Form 843 with the notation “Protective Claim for Refund under Section 2053” written at the top of the form. (Using the Schedule PC approach may be somewhat simpler in that it does not require filing a separate form. However, the IRS apparently will process the Form 843 quicker, because § 4.06(2) contemplates that the IRS will acknowledge receipt of the Form 483 within 60 days but may not acknowledge receipt of the Schedule PC for 180 days. Rev. Proc. 2011-48, § 4.04(1).)

For estates of decedents who die between October 20, 2009 and December 31, 2011, the Form 843 method must be used. (The 2011 Form 706 has already been issued without Schedule PC attached, so that procedure cannot be used for 2011 decedents.)

If a protective claim for refund has been filed previously and if there is any concern that it does not meet the requirements of this Revenue Procedure, the protective claim may be re-filed in accordance with the requirements of the Revenue Procedure as long as the re-filing occurs before the expiration of the statute of limitations on refunds. Rev. Proc. 2011-48, § 4.04(1). The Revenue Procedure provides certain procedures for curing inadequately identified claims, sometimes even after the expiration of the statute limitations, and it provides that there will not be a review of the entire estate tax return when the claim is considered, but those very favorable effects are available only if the procedures described in Rev. Proc. 2011-48 are followed. Rev. Proc. 2011-48, §§3, 4.06(3).

4. *Separate Filing Required For Each Separate Claim or Expense.* A separate protective claim for refund for each separate claim or expense should be filed on a separate Schedule PC or a separate Form 843. Rev. Proc. 2011-48, § 4.04(2). (The IRS will want to be able to match each notification to perfect a claim for refund with the original protective claim form.)

5. *Identification of the Claim or Expense; Ancillary Expenses.* Each claim or expense for which a protective claim for refund is made must be clearly identified with “an explanation of the reasons and contingencies delaying the actual payment to be made in satisfaction of the claim or expense.” Rev. Proc. 2011-48, § 4.05(1). For contested matters, the protective claim must identify the contested matter and potential liability by including the name of the claimant, the basis of the claim, “the extent or amount of the liability claimed,” and a brief statement of the status of the contested matter. (A copy of relevant court pleadings generally will be sufficient to identify the claim.) Rev. Proc. 2011-48, § 4.04(3).

There is no necessity that the protective claim “state a particular dollar amount.” The 2009 § 2053 regulation confirms that even though the “specific dollar amount” issue is not addressed in the Revenue Procedure. Treas. Reg. § 20.2053-1(d)(5). This is a very important consideration in crafting the protective claim because a request for a specific high dollar amount of deduction would likely be a “smoking gun” in the underlying litigation about the contingent claim.

Ancillary expenses (such as attorneys’ fees, court costs, appraisal fees, and accounting fees) “related to resolving, defending, or satisfying the identified claim or expense” are automatically included as part of the claim for refund without the need for separate identification of these ancillary expenses. Rev. Proc. 2011-48, § 4.04(2).

CCA 200845045, provides a general overview of protective claims. While Rev. Proc. 2011-48 does not specifically refer to this Chief Council Advice, it may nevertheless assist in understanding the type of information that the IRS is seeking in identifying claims. CCA 200848045 says that Reg. § 301.6402-2 does not require that a particular dollar amount be asserted but the claim must “identify and describe the contingencies affecting the claim.” This requirement “is interpreted liberally by the Service. So long as the claim is sufficiently clear and definite [to] apprise us of the essential nature of the claim, it will be accepted as having met the requirement.” (This is important because providing too much detail about what makes the claim contingent may give the other side in the litigation insight into the taxpayer’s perceived weaknesses in its case.)

6. *Processing of Protective Claim After It Is Filed.* The IRS will not perform a substantive review of a protective claim for refund until the IRS is notified that the claim has been paid or the amount ascertained. However, the IRS may reject the protective claim initially if preliminary procedural requirements are not satisfied. If the claim is not initially rejected, the IRS will send an acknowledgment to the filer that the claim has been received, but the acknowledgment does not constitute a determination that the preliminary procedural requirements have been satisfied. Rev. Proc. 2011-48, § 4.06(1). If the filer does not receive the acknowledgment within 180 days of filing a Schedule PC or within 60 days of filing a Form 843, the filer should contact the IRS within 30 days after the expiration of those periods (or else the opportunity of curing inadequately identified claims after the period of limitations on refunds has expired will not be available). Rev. Proc. 2011-48, § 4.06(2). The failure to contact the IRS timely in this circumstance would also appear to cause the estate to lose the limited scope of review as discussed in Item 10 below. *See* Rev. Proc. 2011-48, § 3.
7. *Opportunity to Cure Inadequately Identified Claims.* If “preliminary procedural requirements” for a valid protective claim for refund, are not satisfied (including the penalty of perjury statement), the protective claim may only be cured before the expiration of the statute of limitations on refunds. However, if the protective claim is valid except that it fails to sufficiently identify the claim or expense, the protective claim may be corrected even after the expiration of

the period of limitations on refunds “by submitting a corrected (and signed) protective claim for refund” before the last to occur of (1) the expiration of the period of limitations, or (2) within 45 days after the IRS gives notice of the defective identification. Rev. Proc. 2011-48, § 4.06(3). (As described above, this cure opportunity does not apply if the IRS fails to acknowledge receipt of the protective claim and the taxpayer fails to contact the IRS within the time frame described in the preceding paragraph.)

CCA 299848005, discussed above, provides that a “general” claim may be amended following the running of the statute of limitations to supply missing information that caused the claim to be “general,” but an untimely new claim may not be filed after limitations have expired. The distinction is that the claim is treated as a time-barred new claim “if it would require the investigation of new matters that would not have been disclosed by the investigation of the original claims” or if it asserts a different legal ground for the refund. Rev. Proc. 2011-48 does not mention the possibility of amending “general” protective claims for refund after the period of limitations on refunds has expired. The more specific procedure described in the Revenue Procedure of being able to correct inadequately identified claims within 45 days of receiving notice from the IRS of an inadequate claim will likely be the only opportunity available to cure the description in the claim after the period of limitations has expired.

8. *Audit Not Delayed.* Filing a protective claim for refund does not suspend the estate tax audit or delay the issuance of a closing letter. Rev. Proc. 2011-48, § 4.06(4)
9. *Perfecting Protective Claim by Notifying IRS of Payment or Resolution of Contingency.* The IRS must be notified within 90 days after the date on which the amount of the claim or expense is paid or becomes certain and is no longer subject to any contingency. (The Revenue Procedure refers to this as a “notification for consideration.”) If the IRS is not advised within that 90 day time period, the person seeking the refund may provide an explanation in an attempt to establish a reasonable cause for the delay.

The Revenue Procedure does not explicitly say so, but apparently, the claim for refund is forever barred after the expiration of the general period of limitations if the taxpayer does not meet the 90-day deadline or establish reasonable cause for the delay. This could be problematic, because it may not always be easy to determine exactly when the claim becomes deductible. Treas. Reg. §20.2053-1(d)(4) says that the claim is deductible when it is “ascertainable with reasonable certainty” and “will be paid.” If there is any question whether a claim has become ascertainable with reasonable certainty, presumably the estate would want to go ahead and file the notice for consideration to make sure that the 90-day deadline is satisfied. If the IRS determines that the claim is not yet deductible, the notice could be re-filed at a later date when it becomes more “ascertainable.”

For multiple recurring payments, the notification for consideration can be given within 90 days of either the date of the last and final payment or annually with respect to payments made since the last notification for consideration. Rev. Proc. 2011-48, § 5.02(2). Thus, the estate has the option of waiting until all of the payments have been made to request the full refund or it can request a partial refund as payments are made (but no more often than annually).

The notification must also “indicate whether other notifications for consideration are being filed contemporaneously or were previously filed and the approximate date of each such filing.” Rev. Proc. 2011-48, § 5.03(2).

The methods for filing the notification for consideration are similar to the methods for making the initial protective claim for refund. For estates of decedents dying after 2011, the notification may be given by filing either:

(1) a supplemental Form 706 including each schedule affected by the allowance of the deduction with an updated Schedule PC for each claim that has become deductible (certain verbiage must be written at the top of the supplemental Form 706 and a copy of the initial protective claim for refund must be attached); or

(2) Form 843 (with similar verbiage written at the top of the form) identifying the claims or expenses that have become deductible, together with a copy of the originally filed protective claim for refund. Rev. Proc. 2011-48, § 5.02(1). A computation of the amount to be refunded must be included with the Form 843 (there would obviously be a recomputation of the estate tax if the supplemental Form 706 approach were used). Rev. Proc. 2011-48, § 5.05.

For estates of decedents dying between October 20, 2009 and December 31, 2011, the Form 843 approach must be used.

10. *Limited Scope of Review.* Rev. Proc. 2011-48 confirms that “generally the Service will limit its review of the Form 706 to the deduction under section 2053 that was the subject of the protective claim.” Rev. Proc. 2011-48, § 5.01, referencing Notice 2009-84. **However, very importantly, the limited review described in Notice 2009-84 and in § 5.01 does not apply to “[a] taxpayer that chooses not to follow or fails to comply with the procedures set forth in this revenue procedure.”** Rev. Proc. 2011-48, § 3.

The explicit reference to Notice 2009-94 is important, because that Notice provides insight into why the IRS inserted the word “generally” in the sentence about limiting the scope of review. The Supreme Court has held that the IRS can examine each item on a return to offset the amount a refund claim, even after the period of limitations on assessment has run. *Lewis v. Reynolds*, 284 U.S. 281, 283 (1932). However, the IRS in Notice 2009-84 agreed that it would limit the review of protective claims for refund to preserve the ability to claim a deduction under §2053 “to the evidence relating to the deduction under section 2053,” and not exercise its authority to examine each item on the return to offset a refund claim. This limitation does not apply if the IRS is considering a claim for refund not based on a protective claim regarding a deduction under §2053 in the same estate. Also, the Notice says the limitation applies “only if the protective claim for refund ripens after the expiration of the period of limitations on assessment and does not apply if there is evidence of fraud, malfeasance, collusion, concealment, or misrepresentation of a material fact.” The Revenue Procedure is not as explicit but makes a passing reference to this requirement about the refund ripening after the period of limitations has run. It says the limited scope of review applies when determining “whether there is an overpayment of tax based on a timely-filed section 2053 protective claim for refund *that becomes ready for consideration* after the expiration of the period of limitation on assessment ...” (Accordingly, there may be an advantage in not having resolved the underlying lawsuit regarding the claim against the estate until after the period on additional assessments has run — to the extent that there may be items on other parts of the estate tax return that the IRS might question if it could.)

11. *Authority of Person Other Than Executor or to Pursuit Claim for Refund.* If an executor is no longer acting on behalf of the estate, one or more persons who receive probate or nonprobate

assets may establish “under applicable local law” that person’s authority to pursue the claim on behalf of the estate. Such person must attach to the notification for consideration “documentary evidence” that substantiates that person’s authority. However, the IRS “will pay the refund of tax to the person or individual who paid the tax, as required by section 6402(a) and subject to regulations under that section.” Rev. Proc. 2011-48, § 5.04.

12. *Coordination With Marital or Charitable Deduction.* The § 2053 regulations solved a terrible potential liquidity timing problem by providing that the possibility of a contingent claim against an estate will not reduce the amount of marital or charitable deduction available on the estate tax return even if the contingency is payable out of a marital or charitable share. Instead, the marital or charitable deduction will be reduced when the contingency is resolved (but generally would be offset by the §2053 deduction for that same amount). Treas. Reg. §20.2053-1(d)(5)(ii). Rev. Proc. 2011-48, § 5.05 confirms that “[t]he computation of the amount to be refunded under section 2053 ... should identify any necessary adjustment to the marital and charitable deductions claimed by the estate, as well as any other arithmetic adjustments that result from the allowance of the deduction.”
13. *Effective Date.* The Revenue Procedure applies to protective claims for refund under § 2053 for decedents dying on or after October 20, 2009.