



International Tax ADVISORY ■

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Timing May Be Everything for Foreign Tax Credit-Related Refund Claims

The procedural aspects of foreign tax credit carrybacks have received some press that highlights the significance of the statute of limitations periods in making successful tax refund claims. In *Albemarle Corp. v. United States*, 118 Fed. Cl. 549, decided October 20, 2014, and in CCA 201330031, the taxpayers' refund claims attributable to foreign tax credits were found to be time-barred. Taxpayers should strongly consider filing protective refund claims to help avoid having otherwise valid refund claims barred by the limitations period.

In *Albemarle*, the United States Court of Federal Claims held that the taxpayer's claims for refunds attributable to foreign tax credit carrybacks for certain years were time-barred. The case involved Albemarle's Belgian subsidiary, which in 2002 agreed to pay and did pay additional Belgian withholding taxes arising out of an audit determining that such taxes were due on interest payments on debentures the subsidiary had issued to Albemarle, an accrual basis taxpayer. The additional taxes were allocated to each of the years at issue in the audit, 1997 through 2001. As a result of the payment of the additional withholding taxes in 2002, Albemarle filed an administrative refund claim in May 2009 in the form of an amended tax return for the 2002 tax year. In its refund claim, Albemarle claimed foreign tax credits for each of the years at issue, 1997 through 2001. The IRS allowed the refund claims for 1999 through 2001, but denied the refund claims attributable to 1997 and 1998, arguing that the taxpayer's claims for the two earlier years were not timely.

The court considered the interpretation of the limitations period for filing refund claims attributable to foreign tax credits under Section 6511(d)(3)(A), an issue further complicated by the fact that the statutory provision had been amended by the Taxpayer Relief Act of 1997. Under the pre-amendment version, a claim for credit or refund attributable to foreign taxes paid must have been brought within 10 years of the date prescribed by law for filing the return for the year the claim was made. As amended, the 10-year period runs from the date prescribed by law for filing the return for the year in which the foreign taxes were actually paid or accrued.

The parties agreed that the "all events test" governed the accrual of foreign taxes pursuant to Section 1.461-4(g)(6)(iii)(B) of the Regulations and that the test was met in 2002. However, they disagreed on whether the accrual in 2002 dictated the start of the 10-year limitations period. Albemarle argued that the plain language of Section 6511 (d)(3)(A) meant that the 10-year period ran from March 15, 2003, the due date for its 2002 tax return, making the refund claims filed in

May 2009 timely. As the court put it, Albemarle was claiming that the foreign taxes accrued once in 1998 “to trigger [Albemarle’s] ability to claim the foreign tax credit, and then actually accrued in 2002 when the contested liability was resolved and paid.” Characterizing the taxpayer’s argument as “bizarre” and clearly unintended by Congress, the government contended that the relation back doctrine and redetermination rules of Section 905(c) meant that the accrual must relate back to the years 1997 and 1998. Timely refund claims attributable to foreign tax credits for those years should have been filed on or before March 15, 2008, and March 15, 2009, respectively.

The court found that the language “actually paid or accrued” in the amended version of Section 6511(d)(3)(A) was not clear on its face and therefore resorted to the legislative history of the Taxpayer Relief Act of 1997. In reviewing the legislative history, the court sided with the government’s view of the statute’s interpretation—specifically, that the limitations period should be “linked to” 1997 and 1998 under the relation back doctrine. The court defended this result by reasoning that Albemarle’s election to take the foreign tax credit occurred in 1997 and 1998 and that the amount of credit was based on Albemarle’s income in those years. According to the court, the taxpayer’s position would upset “symmetry” of the interrelationship of Sections 901 and 6511 and call for an unjustified “bifurcation” in the treatment of contested versus uncontested foreign taxes in applying Section 905’s redetermination rules. The distinction between the pre-amendment and post-amendment versions of Section 6511(d)(3)(A), while addressed, did not ultimately affect the outcome denying the taxpayer’s refund claims for 1997 and 1998 as untimely. The taxpayer has appealed the decision.

The timing of refund claims attributable to foreign tax credits was also at issue in Chief Counsel Advice (CCA) 201330031. There, the taxpayer had taken a foreign tax credit in Year 8. In Year 17, the taxpayer changed its mind and filed an amended return for Year 8 to change from a credit to a deduction. The taxpayer also filed in Year 17 an amended return for Year 3 to reflect the carryback of a net operating loss (NOL) created by the deduction now taken in Year 8. As a result, the taxpayer claimed that the increased NOL carryback from Year 8 released excess foreign tax credits in that year, which the taxpayer could carry back to Year 1 and therefore filed in Year 17 refund claims for Year 1.

The CCA considered whether the 10-year limitations period of Section 6511(d)(3)(A) applied to a deduction (rather than a credit) of foreign taxes and whether the refund claim for Year 1 was timely. The IRS concluded that the refund claim was not timely because, in its view, the 10-year limitations period does not apply to the deduction of foreign taxes in Year 8. Further, because the refund claim for Year 1 was attributable to the carryback of excess foreign tax credits in Year 3 (not Year 8), the refund claim filed in Year 17 was time-barred under Section 6511(d)(3)(A).

As the *Albemarle* case and CCA 201330031 show, timing can be everything in claiming refunds attributable to foreign tax credits. The substantive foreign tax credit rules are complex enough without the complication of the convoluted procedural rules, and protective refund claims may help taxpayers avoid issues with the latter. Protective claims can be especially helpful in cases such as *Albemarle* where the taxpayer disputes a foreign tax assessment. (Indeed, the court and the government in the case noted that the taxpayer had failed to file protective claims even after the additional taxes were paid in 2002.)

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