

## **Refund Claims: The Second Circuit Upholds the Use of Informal Protective Claims.**

Normally, a taxpayer who wants a refund makes a formal administrative claim by filing an amended return. The claim usually has to be filed within three years of the filing of the return or two years of the payment of the tax, whichever is later. I.R.C. § 6511(a). Courts also recognize informal claims in certain circumstances. In addition, where the taxpayer's right to a refund is contingent, a protective claim can be filed to preserve its right to seek a refund at a later time. *See, e.g., Swietlik v. United States*, 779 F.2d 1306, 1307 (7th Cir. 1985).

Recently, the Second Circuit applied these principles, ruling that an informal protective claim sufficed to satisfy the requirement that a timely refund claim be made. *Ambase Corp. v. United States*, 2013 U.S. App. LEXIS 18689 (2d Cir. Sept. 9, 2013). The facts are a little convoluted, but the upshot is this:

- Ambase owned Carteret, a federal savings bank, and began filing consolidated tax returns with it;
- Carteret was seized by regulatory authorities and placed in receivership in December 1992;
- Ambase's 1992 consolidated 1992 return only included Carteret's pre-seizure tax items;
- In 2000, Ambase sought to amend its 1992 return to increase Carteret's bad debt deduction and amend its 1989 tax return to apply a net operating loss generated by the 1992 amendment to obtain a refund.

*Id.*, slip op. at \*4-\*6.

The government and Ambase both agreed that it had until March 31, 1998 to file a refund claim. 2013 U.S. App. LEXIS 18689, slip op. at \*18. They parted company over whether it had met that deadline.

Ambase had several theories on why it could file the amendments; the one that resonated with both the district court and the Second Circuit was an argument that the amendment in 2000 related back to a protective claim filed by the FDIC on behalf of Carteret. *Id.* at \*20-\*23.

In reaching this decision, the court of appeals stated two basic principles. *First*, it stated that a protective refund claim would be recognized for situations in which the right to a refund is contingent upon future events. *Id.* at \*17. *Second*, it stated that informal refund claims would be recognized if they met three criteria: "(1) they must provide the IRS notice of the taxpayer's claim to a refund; (2) they must 'describe the legal and factual basis for the refund;' and (3) they must have a written component." *Id.* at \*17-\*18 (quoting *New Eng. Elec. Sys. v. United States*, 32 Fed. Cl. 636, 641 (1995)).

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