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## A Valid Extension of Time to File a Return May Be Your Best Friend

**Obtaining an extension of time to file a return may be beneficial, even if a taxpayer files its return by the due date, without the extension. This article explains how the option to file a “superseding return” during the extension period provides flexibility, allowing the taxpayer to complete its return with elections, information returns, and attachments that will not be treated as late.**

There are benefits to requesting an extension of time to file a return even if the taxpayer expects to file its return within the prescribed period without an extension. A later return filed before the expiration of the extended period of time to file is a “superseding return” and will provide the taxpayer with a subsequent opportunity to complete the return with elections and attachments that will not be treated as late. As discussed in this article, the benefits include the following:

- Extends time to file return to provide a more accurate return
- Avoids penalties for late filing of international information returns and other forms such as reportable transactions if omission are cured prior to extended due date
- Allows additional time to make an election or revoke an election made on the initial return
- If taxpayer expects a net operating loss or capital loss for the year, allows the taxpayer to file the income tax return early and file a Form 1139, *Corporation Application for Tentative Refund*, or Form 1045, *Application for Tentative Refund*, to carry the loss back in an expeditious manner and still allows the taxpayer to file a complete and accurate return

## Superseding Return

The U.S. Supreme Court's decision in *Haggar Co. v. Helvering*<sup>1</sup> makes it clear that a timely filed amended return, i.e., an amended return filed subsequent to the original return but prior to the due date specified in the Code for filing a return, should be treated the same as the original return.<sup>2</sup> This later return filed before the due date or extended due date for the return is known as a "superseding" return.

An amended return that is filed after the due date (including any extensions) generally does not incorporate anything into the original return.<sup>3</sup> The IRS recognizes the difference between a superseding return and an amended return.<sup>4</sup>

It is a best practice for taxpayers and tax practitioners to routinely request an extension of time to file the income tax return, confirm that any extension is valid, and document that the request for the extension was timely made. Further, taxpayers that are investors in a partnership or S corporation or are beneficiaries in a trust should also request extensions to file their respective income tax returns because they may later receive information from their flow-through entity that may require them to file additional information with the IRS or correct an initial filing.

Many tax returns are complicated and prepared under tight deadlines. Often, later-learned information makes it necessary to correct or report additional information. Whether the corrections are made on a superseding return or an amended return may have significantly different consequences to the taxpayer. The following example highlights these differences.

PRS Partnership, which is subject to the TEFRA partnership rules and is a calendar year taxpayer, has promised its partners, which included individuals and other partnerships, that it would file its return, Form 1065, *U.S. Return of Partnership Income*, by April 15 of the following year and also furnish Schedules K-1 to the partners by April 15. PRS Partnership did not request an extension of time to file its return. For the calendar year 2013, PRS Partnership had invested in several other partnerships. In

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<sup>1</sup> 308 U.S. 389 (1940).

<sup>2</sup> G.C.M. 36932.

<sup>3</sup> Badaracco v. Commissioner, 464 U.S. 386 (1984).

<sup>4</sup> See IRM 3.5.61.1.3 and the efile Instructions to Amended and Superseding Corporate Returns.

Unless otherwise indicated, section references are to the Internal Revenue Code of 1986, as amended (the "Code") or the applicable regulations promulgated pursuant to the Code (the "regulations").

March and early April of 2014, PRS Partnership contacted these partnerships to obtain information so that it could file its 2013 Form 1065 by April 15, 2014. PRS Partnership held a 30 percent interest in LMN Partnership, which advised that it was still gathering information. LMN Partnership provided limited information, and PRS Partnership's allocable share of income was estimated to be \$2 million. PRS Partnership filed its 2013 Form 1065 on April 15, 2014, based, in part, on the estimates provided by LMN Partnership.

In August 2014, LMN Partnership furnished a Schedule K-1 to PRS Partnership in which it reported various items in greater detail. It reported taxable income of \$13 million and a loss of \$11 million. With respect to the loss, LMN Partnership attached a copy of a Form 8886, *Reportable Transaction Disclosure*, that LMN Partnership had filed. LMN Partnership also disclosed that it had purchased an 80 percent interest in a controlled foreign corporation ("CFC") in the United Kingdom and that it had filed a Form 5471, *Information Return of U.S. Person With Respect to Certain Foreign Corporations*. While revisiting its 2013 income tax return after receiving the Schedule K-1 from LMN Partnership, PRS Partnership discovered that it had inadvertently failed to make a section 280C(c) election for a reduced research credit deduction on its timely filed return.

PRS Partnership has several omissions from its timely filed 2013 return that have significant consequences to PRS Partnership.

- PRS Partnership, as a 30 percent owner of LMN Partnership, had an obligation to file a Form 5471 with respect to the UK CFC. Filing the Form 5471 after the due date of the return could subject PRS Partnership to a \$10,000 penalty under section 6038(c) unless it can demonstrate that it had reasonable cause for its failure to timely file the Form 5471.
- Under section 6501(c)(8), the statute of limitations on partnership items from PRS Partnership does not begin to run until the Form 5471 is furnished to the IRS.<sup>5</sup>

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<sup>5</sup> If the taxpayer can establish that it had reasonable cause for failure to file the required information return, the extended period for the statute of limitations for assessment is only for items attributable to the missing information and not the entire return.

- PRS Partnership's 2013 return reflected the benefits of a reportable loss transaction and its failure to file a timely Form 8886 could subject it to a \$10,000 penalty under section 6707A. The section 6707A penalty does not have a reasonable cause exception (but the Commissioner may rescind the penalty).
- The section 280C(c) election is a statutory election that must be on an original return. Therefore, PRS Partnership loses that election for 2013. If PRS Partnership had failed to make a regulatory election required on an original return, it could have requested relief under section 1.9100 to make the election.

Under this example, PRS Partnership is subject to significant penalties and may need to expend substantial resources to seek reasonable cause and or a rescission to avoid these penalties. There is no guarantee that PRS Partnership will be successful on all or any of these attempts to avoid penalties. In addition, PRS Partnership would have been unable to take advantage of section 280C(c) for the 2013 year.

However, if PRS Partnership had filed a timely and valid extension of time to file its 2013 Form 1065, PRS Partnership could file a later return that would be a superseding return if filed on or before September 15, 2014. Thus, it could have attached Form 5471 and Form 8886 and made a timely election under section 280C(c).<sup>6</sup>

Partners in PRS Partnership could also be affected by this later information. For example, if a partner was an individual and that partner's share of the reportable transaction loss exceeded the reportable loss threshold, then that individual would have a requirement to file a Form 8886. Likewise, it is possible that a partner in PRS Partnership could have a sufficient ownership interest so that the partner would also be required to file a Form 5471 with respect to UK CFC. Partners that had requested extensions to file their own income tax returns could avoid these penalties for corrective filings made before the extended due date, while partners that did not seek extensions of time to file could face penalties and extended statute of limitations for assessments and incur significant expenses in seeking to avoid the penalties.

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<sup>6</sup> See C.C.A. 200645019 (June 20, 2006). A Form 5471 filed with a superseding return is timely even if the taxpayer did not file a Form 5471 with its previous return. Chief Counsel Advice is not precedent under section 6110(k)(3).

The above example illustrates only a few of the errors or failures that can routinely occur with respect to filing a complicated original return within the prescribed due date. Often, there is a great deal of pressure in gathering the numbers and information to complete the numbers portion of the return accurately, and inadvertent errors are made with respect to other matters that do not affect the ultimate tax liability but may have significant impact on elections, penalties, and resources.

### Statute of Limitations with Respect to Assessments and Refunds of Superseding Returns

There is no court case or published guidance that addresses whether the filing date for the initial return or the last superseding return is the filing date for assessments under section 6501 or for refunds or claims under section 6511. Although we believe that the better date for purposes of section 6501 and 6511 is the date the IRS receives the superseding return, the informal guidance issued by the IRS is conflicting. Several Chief Counsel Advice<sup>7</sup> provide that the filing of a superseding return is treated as the original return and starts the statute of limitations for assessment under section 6501, while one Chief Counsel Advice provides that the initial return starts the statute of limitations for assessments.<sup>8</sup>

If a taxpayer plans to file a refund claim, we recommend that the taxpayer obtain a transcript from the IRS to show the assessment statutory expiration date to ascertain what date the IRS believes is the expiration date. If possible, we also recommend that the taxpayer file its claim for refund based on the filing of the initial return to preclude any challenge that the refund claim was filed untimely.

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<sup>7</sup> Informal advice may not be cited or used as a precedent. Section 6110(k)(3). "This does not mean, of course, that private letter rulings cannot be looked to as a source of guidance in understanding the IRS's interpretation of the tax laws." Florida Power & Light Co. v. United States 56 Fed.Cl. 328 (2003)

<sup>8</sup> See C.C.A. 201048037 (Dec. 3, 2010); C.C.A. 200645019 (Nov. 10, 2006), C.C.A. 201118021 (April 8, 2011), and G.C.M. 38914 (Nov. 8, 2982), which provide that the superseding return is the original return and starts the statute of limitations for assessment, while C.C.A. 200645019 (Dec. 19, 2001) provides that the initial return rather than the superseding return starts the statute of limitations for assessment.

## Request for Extension of Time to File

In general, section 6072 sets out the time for various taxpayers to file their respective income tax returns. For example, the Form 1040 series for individuals are due by April 15 of the following year and Forms 1065 for calendar-year partnerships are also due by April 15 of the following year. Forms 1120 for calendar corporations are due by March 15 of the following year and Forms 1120-F for foreign calendar-year corporations (having no office or place of business in the United States) are due by June 15 of the following year.

Section 6081 allows the Secretary to grant a reasonable extension of time for filing any return, declaration, statement, or other document, and except in the case of taxpayers who are abroad, the extension cannot be for more than six months. The IRS now provides for several different automatic extensions of time to file depending on the status of the taxpayer.

Form 4868, *Application for Automatic Extension of Time To File U.S. Individual Income Tax Return Application*, generally allows an individual filing the Form 1040 series a six-month extension to file the return. The Form 4868 requires an estimate of liability and the balance due, if any. There is no requirement to pay; however, interest and possibly a late payment penalty are imposed if the amount unpaid is not paid by the return due date, not extended due date.

Form 7004, *Application for Automatic Extension of Time to File Certain Business Income Tax, Information and Other Returns*, also provides other taxpayers an automatic extension of time to file. Taxpayers filing Forms 1065, 8804, and 1041 are allowed an automatic five-month extension, while other taxpayers are allowed an automatic six-month extension, e.g., Forms 1042, 1065-B, 1120.<sup>9</sup> Form 7004 does not extend the time for payment of tax. Taxpayers that do not pay the tax when due may be subject to interest and late payment penalties.

Corporations or an affiliated group of corporations filing a consolidated return must pay the amount shown on the Form 7004 on or before the due date of the return or the extension is not valid. This failure could cause a late filing penalty if the return is filed after the due date. It is also important to make a good faith estimate of the tax liability on the

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<sup>9</sup> For a complete list, please see Form 7704.

extension request or the request may be invalid.<sup>10</sup> The fact that a corporation or consolidated group files its Form 7004 early does not require a payment until the unextended due date for the return.

## Conclusion

In an effort to avoid the pitfalls described in this article, it would be prudent for taxpayers that file Forms 7004 and Forms 4968 to request extensions of time to file as a matter of routine practice, even if the taxpayers expect to file the returns within the unextended due dates for the returns. The same is true for flow-through entity taxpayers—investors and beneficiaries pursuant to flow-through entities should consider, with their own tax advisors, filing extensions to file their returns.

Prior to the unextended due date for the return, it is advisable for taxpayers that Forms 7004 or Forms 4868 to confirm that extensions were properly filed and that there is supporting documentation to that effect. Care should be taken that the extensions are correctly completed, especially for corporations filing a consolidated return, and that, if required, payment of tax is made by the due date of the returns.



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<sup>10</sup> Crocker v. Commissioner, 92 TC 899 (1989)