

Time Limits for Filing Refunds Related to Foreign Tax Credits

By Andrew R. Roberson

Multinational taxpayers often face disputes with foreign jurisdictions regarding the proper amounts of taxes due to that jurisdiction. The resolution of such disputes can impact the amount of foreign tax credits (“FTCs”) that can be claimed in the United States to offset the additional foreign taxes. Because foreign tax disputes may not be resolved for several years after the taxpayer files its U.S. corporate income tax return, Congress has provided special rules to ensure that taxpayers are not punished in the form of foregone FTCs when the disputes are resolved prior to the normal limitations period for amending the U.S. return to claim additional credits. The scope of the limitations period was recently addressed by the Court of Federal Claims in *Albemarle*.¹

Generally, a taxpayer must file a claim for credit or refund of overpayments of tax within the later of three years from the time the return was filed or two years from the time the tax was paid.² For claims relating to an overpayment attributable to taxes paid or accrued to a foreign country, this period is extended to “10 years from the date prescribed by law for filing the return for the year in which such taxes were actually paid or accrued.”³ Prior to its amendment in 1997, the statute required that such claim be made within 10 years from the date prescribed by law for filing the return for the year with respect to which the claim was made.

In *Albemarle*, the taxpayer reached a settlement with the Belgian tax authorities in 2002 relating to its 1997–2001 tax year and made payments of additional tax to Belgium on January 31, 2002, and August 29, 2002. On May 15, 2009, the taxpayer filed a refund claim related to its 1997–2001 tax years. The IRS permitted the refund claims for the 1999–2001 tax years, but denied the 1997 and 1998 claims on the ground that they should have been filed on or before March 15, 2008 and 2009, respectively. In other words, the IRS read Code Sec. 6511(d)(3)(A) as requiring that any refund claims be filed within 10 years from the date the tax return for these years were due, without extension (the returns were filed on September 15, 1998 and 1999, respectively).⁴ The taxpayer argued that the plain language of the statute allowed a claim for refund to be filed within 10 years from the date the payment was made (*i.e.*, 10 years from 2002), not the date the return was filed.



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The Court of Federal Claims, perhaps realizing that its opinion would be appealed given the novel issue presented, discussed the applicable procedural and substantive law in considerable detail. Despite its detailed discussion, the legal analysis is questionable at times.

The court's initial analysis focused on the parties' agreed position that the accrual of foreign taxes for purposes of the foreign tax credit is based on the all-events test. Under a three-prong test, the all events test is met when: (1) all events have occurred which determine the fact of liability; (2) the amount of the liability can be determined with reasonable accuracy; and (3) economic performance has occurred.⁵ The court found that there was no dispute that the all-events test was not met until 2002, when the Belgian dispute was resolved.⁶ Notably, however, the court's analysis of the third prong is confusing in that it discussed arguments related to whether the transaction that gave rise to the contested foreign taxes had economic substance. It appears the court confused the timing concept of economic performance with the substantive concept of economic substance, although ultimately this apparent mischaracterization did not impact the overall analysis.

Taxpayers should also consider filing protective refunds claims in situations where it does not appear that a tax payment to a foreign jurisdiction will actually be made (and there will be enough time to file a formal refund claims with the IRS) within 10 years from the date the U.S. return was filed.

The court next discussed the parties' competing arguments on whether the relation-back doctrine applied, requiring that the 2002 payments be treated as if they were paid or accrued on the date the 1997 and 1998 returns were due. The taxpayer argued that the plain meaning of the phrase "year in which such taxes are actually paid or accrued" meant the year in which the taxes accrued in fact, not the year in which the taxes accrued under a legal fiction (*i.e.*, the relation-back doctrine). This argument is compelling, as Congress purposely inserted the word "actually"—which modifies both paid and accrued—and made no mention of the relation-back doctrine in the

statute. The government responded that the statute was ambiguous, but, even if clear, the taxpayer's reading would create a bizarre result of the same foreign tax liability accruing on two different dates.

The court, without any explanation, concluded that the pertinent phrase was not clear from the face of the statute and proceeded to the legislative history. It did not attempt to employ dictionary definitions or look to other sections of the Code that might contain similar provisions—two common tools employed by courts in statutory construction cases. Further, it effectively removed the work "actually" from the statute without any analysis or support. Indeed, the court noted and agreed with the government's position that the lack of the use of the word "actually" in the legislative history or Joint Committee on Taxation's general explanation of the changes (the "Bluebook") decreased its significance in the statutory text. This is backwards—the language of the statute, not the lack of language in the legislative history of the Bluebook—is controlling.

Brushing aside the plain language of the statute, the court relied primarily on the portion of the legislative history indicating that the 1997 amendment was intended to overrule the Court of Claims' opinion in *Ampex*.⁷ In that case, which was decided under the pre-1997 version of the statute, the court held that a claim for refund attributable to foreign taxes filed within 10 years of the date a return claiming carryovers of tax credits from earlier years was timely, even though more than 10 years passed from the date of the returns for the earlier years. Based on the legislative history, the court held that 1998, not 2002, was the proper year for judging whether the 10-year limitations period had expired with respect to the refund claim for 1998.⁸

Regarding 1997, the court rejected the government's convoluted effective date argument that when Congress amended the statute to apply effective for tax years beginning on or after August 5, 1997 (the taxpayer's 1997 tax year began on January 1, 1997), it meant the change impacted ongoing tax years. Without discussing the rationale of its earlier opinion in *Ampex*, the court applied the relation-back doctrine and cited the Sixth Circuit's opinion in *Chrysler*, which had disagreed with *Ampex*.

Again, perhaps sensing that its opinion would be the subject of further review, the court looked at the taxpayer's subjective actions and took it to task for waiting until 2009 to file its refund claims. It brushed aside the taxpayer's reasons for the delay, essentially finding that the taxpayer was at fault for waiting this extra time. This analysis, which should be viewed as *dicta*, is troubling because there is no room in Code Sec. 6511(d)(3)(A) for subjective inquiries

into the taxpayer's state of mind for when it files its refund claims. Compounding the problem, the court noted that the taxpayer's "plight might have generated more sympathy" if, through no fault of its own, the foreign tax dispute was not settled until more than 10 years after the return was filed. This analysis is troubling, as the statute is designed to provide a bright-line determination of timeliness and inquiries into the subject intent and reasonableness of a taxpayer's actions could result in an unworkable framework for deciding future cases.

Albemarle is questionable on several points and many of the court's findings are legal in nature, which means that they would be reviewed *de novo* without any deference to the court's fact findings. If an appeal is filed, taxpayers in a similar situation may want to wait and see how the Federal Circuit reacts, assuming that they are not subject to any deadline for filing suit in court. Protective refunds should also be considered, if appropriate and possible. If no appeal is made, taxpayers seeking to litigate their issue should carefully consider whether to file suit in local district court to avoid the negative precedent in the Court of Federal Claims. Although an opinion of one judge from that court is not binding on another judge of the court,⁹ it may be more difficult to convince the second judge to depart from *Albemarle*. Taxpayers should also consider

filing protective refunds claims in situations where it does not appear that a tax payment to a foreign jurisdiction will actually be made (and there will be enough time to file a formal refund claims with the IRS) within 10 years from the date the U.S. return was filed.

ENDNOTES

¹ *Albemarle Corp.*, FedCl, No. 12-184T (2014). The opinion was reissued on October 20, 2014.

² Code Sec. 6511(a).

³ Code Sec. 6511(d)(3)(A).

⁴ The IRS's "without extension" position is based on its regulations, even though the statute does not contain this language, and extensions are automatic if properly requested. The court did not address this issue, instead focusing on the year during which the statute began to run rather than the particular date within the year.

⁵ Code Sec. 461(h); Reg. §1.461-1(a)(2)(i).

⁶ This conclusion is supported by numerous long-standing authorities, including Rev. Rul. 58-55, 1958-1 CB 266, which holds that contested foreign taxes cannot actually be accrued "until the contested liability is finally determined," although such taxes ultimately "relate back" to the year from which the liability arose.

⁷ *Ampex Corp.*, CtCls, 80-1ustc ¶9358, 620 F2d 853.

⁸ The court noted that the U.S. Court of Appeals for the Sixth Circuit, in *Chrysler Corp.*, CA-6, 2006-1 ustc ¶150,155, 436 F3d 644, an opinion involving the pre-1997 version of the statute, had disagreed with *Ampex*.

⁹ *Compare Grapevine Imports, Ltd.*, CtCls, 2007-2 ustc ¶150,555, 77 FedCl 505 (six-year limitations period does not apply to omission from gross income resulting from overstatement of basis) with *Salman Ranch Ltd.*, CtCls, 2007-2 ustc ¶150,803, 79 FedCl 189 (six-year limitations period does apply to omission from gross income resulting from overstatement of basis).

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