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DETERMINING "PREMIUMS PAID" FOR PURPOSES OF APPLYING THE PREMIUM EXCISE TAX TO FUNDS WITHHELD REINSURANCE

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Since 1917, the federal tax law has included an insurance excise tax.[1] Over the last century, various modifications and refinements have occurred, but the excise tax remains. In its current form, I.R.C. § 4371 imposes an excise tax on policies issued by foreign insurers or reinsurers covering U.S. risks.[2] The rate of tax is 4 percent of each dollar of premium paid for property and casualty insurance and 1 percent of each dollar of premium paid for life, sickness, or accident insurance or for reinsurance. The beneficiary of the policy and any person who issues or sells the policy are jointly and severally liable for the tax, although the Internal Revenue Service (the "IRS") generally looks to the person making the premium payments for the tax. Certain U.S. income tax treaties waive the excise tax if conditions specified in the treaty are satisfied.

The basic structure of the premium excise tax is simple, but its application to actual transactions can raise difficult questions. One particular area that raises issues is funds withheld reinsurance, a type of indemnity reinsurance. In a funds withheld reinsurance arrangement, the ceding company typically retains the initial premium due the reinsurer, usually in an amount equal to the statutory reserves attributable to the business identified in the reinsurance agreement. The ceding company withholds the funds to permit statutory reserve credit for non-admitted reinsurance, to reduce the ceding company's potential credit risk, or to retain control over investments. The ceding company and reinsurer establish accounting records that allow the parties to track increases and decreases in the net balance of the funds withheld. The ceding company uses the funds withheld to satisfy obligations of the reinsurer, such as expense reimbursement and the payment of claims. The net balance of the funds withheld increases or decreases over time as the reserves increase or decrease, surplus is repaid, and profit emerges. An investment adjustment is made each period to reflect the fact that the ceding company is holding the reinsurer's assets.

Except for the reinsurer's risk charge (the portion of the reinsurance premium that the reinsurer retains for providing the reinsurance), cash is not typically transferred between the ceding company and the reinsurer until the net balance of the funds withheld equals zero. The reinsurance is typically terminated once the net balance reaches zero because there is little need for continuing reinsurance coverage. If termination occurs prior to that time, the assets held by the ceding company on behalf of the reinsurer are "returned" to the ceding company.

In an audit technique guide released on the IRS website in October 2008, the IRS expressed its view on the application of the premium excise tax to funds withheld reinsurance. The IRS asserted that:

> In determining when premiums are paid, and thus subject to the tax, the accrual method of accounting, not the cash-basis method of accounting applies. Revenue Ruling 77-453, 1977-2 C.B. 237, and G.C.M. 37,201 (July 26, 1977) support an interpretation of the term "amounts paid for reinsurance" under IRC § 832(b)(4) as including amounts accrued as well as amounts actually paid. Ceded premiums are considered paid to the reinsurer when all events have occurred that fix the reinsurer's right to the premiums and the amount of such premiums is reasonably ascertainable.[3]

The IRS did not provide a further explanation of this position. It did state that some taxpayers have taken the position that the premium excise tax applies only to actual transfers made by the ceding company to the reinsurer, which it called "an incorrect position."[4] It also stated that some taxpayers have taken the position that the excise tax applies only to the net amount of the ceded premiums.

No authority directly addresses this question, so taxpayers and the IRS are left with the plain language of the statute and Treasury regulations, as well as authorities addressing other tax provisions they believe provide relevant analogies, to determine the proper application of the premium excise tax to funds withheld reinsurance. Several of these authorities are discussed below, including those briefly mentioned in the audit technique guide. As that discussion demonstrates, the IRS position expressed in the audit technique guide is questionable. The underlying flaw in the IRS position is that it seeks to apply an income tax accounting concept (the accrual method of accounting) to an excise tax.[5] Excise taxes are generally imposed on a transaction, which contemplates a specific event. The issue with the premium excise tax, therefore, is identifying when the tax attaches and measuring the tax at that time. In contrast, an income tax is concerned with determining a net taxable amount that takes into account many events occurring during a taxable year. While the accrual method of accounting has great relevance in that context, it has little utility in the excise tax context.

THE TAXPAYER POSITION

In examining this question, one begins with the statute and the relevant Treasury regulations. I.R.C. § 4371(3) states that a 1 percent excise tax is imposed "on each dollar, or fractional part thereof, of the premium paid on the policy of reinsurance." Treas. Reg. § 46.4371-3(b) provides that "the term 'premium payment' means the consideration paid for assuming and carrying the risk or obligation, and includes any additional assessment or charge paid under the contract, whether payable in one sum or installments." Consistently, Treas. Reg. § 46.4374-1(b) provides that liability for the tax "shall attach at the time the premium payment is transferred to the foreign insurer or reinsurer (including transfers to any bank, trust fund, or similar recipient, designated by the foreign insurer or reinsurer), or to any nonresident agent, solicitor, or broker." Recognizing the nature of an excise tax, each of these provisions requires that an actual premium payment occur before the excise tax may apply, and then it applies only to that specific payment.

LEGISLATIVE HISTORY

Prior to 1965, I.R.C. § 4371 measured the excise tax according to the "premium charged" and I.R.C. § 4374 required that the tax be paid by stamp. In the Excise Tax Reduction Act of 1965 (the "1965 Act"), Congress amended those provisions to permit the payment of the excise tax by return.[6] In addition, the 1965 Act required the tax to be based on the "premium paid" rather than the "premium charged" if the tax was paid by return. In the Tax Reform Act of 1969 (the "1969 Act"), Congress again amended I.R.C. § 4371 to reflect the implementation of a return system. The 1969 Act required the tax to be measured by the "premium paid" in lieu of the "premium charged" in all cases.[7] These changes reflect a congressional intent to measure the premium by the actual payment rather than the gross premium "charged."

OTHER PROVISIONS WHERE PAYMENT MEANS ACTUAL PAYMENT

The rule that "when a statute says paid it means actual payment," is found in numerous instances throughout the Code in addition to the regulations under the premium excise tax. Examples exist under the income tax provisions, the withholding tax provisions, the information return provisions, and even the other excise tax provisions.

While the accrual method of accounting has great relevance in that context, it has little utility in the excise tax content.

For example, I.R.C. § 461(h)(2)(C) of the income tax provisions provides that in certain circumstances economic performance does not occur until "a payment to another person." Treas. Reg. § 1.461-4(g)(1)(ii)(A) defines payment as having "the same meaning as is used when determining whether a taxpayer using the cash receipts and disbursements method of accounting has made a payment." It gives as examples of a payment the furnishing of cash or cash equivalents and the netting of offsetting accounts. It also states that payment does not include the furnishing of a note, a promise to provide services or property in the future (whether or not evidenced by a contract or other written agreement), or an amount transferred as a loan, refundable deposit, or contingent payment. Other income tax provisions provide similar examples.[8]

The withholding tax provisions also make clear that payment as used in the Code does not contemplate an accrual concept. For example, I.R.C. § 3406(a) imposes backup withholding on certain reportable "payments." Treas. Reg. § 31.3406(a)-4(a)(1) provides that if backup withholding is required:

> The payor must withhold at the time it makes the payment to the payee or to the payee's account that is subject to withholding. Amounts are considered paid when they are credited to the account of, or made available to, the payee. Amounts are not considered paid solely because they are posted (e.g., an informational notation on the payee's passbook) if they are not actually credited to the payee's account or made available to the payee.

Similarly, I.R.C. § 3402 imposes income tax withholding on employers making "payment" of wages.[9]

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A transfer of cash from a ceding company to a reinsurer is perhaps the most obvious example of a payment.

I.R.C. § 6041(a), an information return provision, requires reporting on a "payment" made of certain income items. For this purpose:

> an amount is deemed to have been paid when it is credited or set apart to a person without any substantial limitation or restriction as to the time or manner of payment or condition upon which payment is to be made, and is made available to him so that it may be drawn at any time, and its receipt brought within his own control and disposition.[10]

Treas. Regs. §§ 1.6049-1(b) and 1.6044-2(c) contain substantially similar language with respect to interest and dividends, respectfully.

Notwithstanding the structure and language of I.R.C. § 4371, other types of excise taxes are not generally imposed on "payments" or amounts "paid." Nevertheless, there are exceptions. I.R.C. §§ 4261 and 4271 impose excise taxes on certain amounts "paid" for air transportation. These taxes accrue at the time of actual payment, irrespective of when the transportation is provided.[11]

THE SUPREME COURT

Consistent with the interpretations of payment or paid in each of the above examples is the holding of the Supreme Court in *Don E. Williams Co. v. Commissioner*.[12] In that case, the Court rejected the argument that when the Code requires an amount to be "paid," it incorporates the taxpayer's method of accounting. The Court explained that when Congress intends to adopt an accrual standard it uses the phrase "paid or accrued" or "paid or incurred." In contrast, when Congress merely uses the term "paid," it intends a cash basis standard, regardless of the taxpayer's general accounting method. The Court's view is long-standing,[13] and has repeatedly been relied on by the courts and the IRS.[14] Nevertheless, the audit technique guide makes precisely the same argument rejected by the Court—namely, that the term "paid" in I.R.C. § 4371 incorporates the taxpayer's accrual method of accounting.

I.R.C. § 848 REGULATIONS

While the regulations under I.R.C. § 4371 do not specifically address funds withheld reinsurance, the I.R.C. § 848 regulations provide some guidance. I.R.C. § 848 requires insurance companies to capitalize and amortize specified policy acquisition expenses. The amount of such expenses is determined by application of a percentage to the excess of (1) the gross amount of premiums and other consideration over (2) return premiums and premiums and other consideration incurred for reinsurance. The regulations make plain that, in the case of funds withheld reinsurance, the premiums subject to I.R.C. § 848 are considered to be the *net* amount transferred to the reinsurer.[15] This net amount is not grossed up for expenses that are netted against the amounts due the reinsurer.

WHAT CONSTITUTES A PAYMENT?

The above authorities consistently show that the premium excise tax applies only to "payments," thus requiring an understanding of what is a payment. A transfer of cash from a ceding company to a reinsurer is perhaps the most obvious example of a payment. The delivery of a check similarly constitutes a payment, assuming it is honored in due course.[16] A distinction is made, however, between a check and a note, even when the note may be a cash equivalent. "[A] promissory note, even when payable on demand and fully secured, is still, as its name implies, only a promise to pay, and does not represent the paying out or reduction of assets."[17] Thus, in *Don E. Williams*, the Court rejected the argument that the taxpayer's issuance and delivery of an interest-bearing promissory note that was secured by collateral and guaranteed by persons with substantial net worth constituted a payment. Even under these circumstances, the note was merely a promise to pay, which might never be fulfilled.

In the case of funds withheld reinsurance, it is apparent that the ceding company makes a payment to the reinsurer to the extent that it transfers cash (or a check) to the reinsurer. It is equally apparent that the fact that the ceding company has promised under the reinsurance agreement to pay the reinsurer for assuming certain risks does not constitute a payment. Cash and checks, however, are not the only means of making a payment.

A payment may also occur by offset against a debt owed[18] or when a creditor applies property in its possession against a debtor's liability.[19] In *Jergens v. Commissioner*, for example, the taxpayer was determined to have made interest payments when his employer paid interest the taxpayer owed to third parties and offset those amounts against the compensation the employer owed to him. The Tax Court rejected the IRS's argument that the taxpayer had not made a payment because he had not suffered a cash detriment. To the contrary, "[i]n each of the taxable years [taxpayer's] personal account attained a credit balance after the debits were made and he suffered a cash detriment to the extent of the charges made to his account. On the facts, we cannot hold that the requisites for cash basis payments were not met."[20]

Authorities, such as *Jergens*, that state a payment occurs when there is an offset are quite instructive in the context of funds withheld reinsurance. Offsets regularly occur with funds withheld reinsurance. Whenever the ceding company pays an amount that the reinsurer has agreed to reimburse (such as a claim on the portion of a policy that the reinsurer has assumed), the result is a reduction in the amount that the ceding company owes to the reinsurer. Thus, even though no cash is directly transferred from the ceding company to the reinsurer, these authorities support a conclusion that there has been a payment.

THE IRS POSITION

As previously stated, the 2008 audit technique guide reaches a different conclusion from the taxpayer position discussed above, stating that an accrual concept is used to determine the premium payments to which the premium excise tax applies. The audit technique guide does not discuss any of the above authorities, all of which are contrary to its position. Rather, it briefly refers to Rev. Rul. 77-453[21] and G.C.M. 37,201.[22] Separately, it includes a citation to Rev. Rul. 79-138.[23] These authorities are discussed below.

REV. RUL. 77-453

In Rev. Rul. 77-453, the IRS considered when, for purposes of I.R.C. § 832(b)(4), it is appropriate for a ceding company to reduce gross premiums by the amount of reinsurance premiums and, similarly, when a reinsurer should include those same premiums in its gross premiums. The IRS states that for this purpose reinsurance premiums reduce gross premiums written as opposed to being a deductible expense. Once the risks related to the reinsured policies have been shifted to the reinsurer, the ceding company is merely an agent with respect to those risks, and thus cannot earn premiums with respect to them.[24] Accordingly, the ceding company should reduce its gross premiums "when the risks under the reinsured contracts have shifted … and the amount of the reinsurance premium is reasonably ascertainable." As for the reinsurer, it should include in gross premiums "the amount of the reinsurance premium that it has a fixed right to receive under the reinsurance treaty when the amount is reasonably ascertainable."

Rev. Rul. 77-453 does not provide much explanation of its conclusion, but a more robust discussion is found in G.C.M. 37,201, which was prepared in connection with the ruling. In particular, the G.C.M. considers the argument that when I.R.C. § 832(b)(4)(A) allows a deduction for "premiums paid for reinsurance" in calculating premiums earned, it means that a ceding company cannot reduce its gross premiums written until there has been an actual payment of reinsurance premiums. The G.C.M. rejects that argument, concluding that gross premiums should be reduced when the risks on the reinsured policies are transferred to the reinsurer, "which is when all events have occurred to fix the obligation, and the amount of the premiums can be determined with reasonable accuracy." Critically, the G.C.M. states that this conclusion prevents the "absurd and inequitable" result in which both the ceding company and the reinsurer are taxed on the same premium income in the same taxable year as might happen if I.R.C. § 832(b)(4)(A) was interpreted to require an actual payment before the ceding company could reduce its gross premiums written.

Significantly, the possibility of double taxation, which Rev. Rul. 77-453 seeks to avoid, is not present in a situation in

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which one is trying to determine the proper treatment of funds withheld reinsurance for purposes of the premium excise tax. The only issue in such a case is the amount of the premiums to which the premium excise tax will apply; there is no possibility that the tax will be collected more than once on those same premiums. Moreover, the audit technique guide does not explain why this revenue ruling, which addresses issues under I.R.C. § 832, is of greater relevance in determining the application of the I.R.C. § 4371 excise tax than the numerous other Code provisions (some of which are discussed above) that make plain payment requires an actual payment.

REV. RUL. 79-138

The audit technique guide states that the amount of premiums paid, and thus subject to the excise tax, should not be reduced by any allowance due the ceding company from the reinsurer. Rev. Rul. 79-138 is cited as support for this statement, though it is unclear how, if at all, the audit technique guide believes it should apply to funds withheld reinsurance.

In Rev. Rul. 79-138, the IRS considered how the premium excise tax should apply to two situations involving coinsurance. In the first, the ceding company agreed to pay the reinsurer its proportionate share of the premiums received on the policies covered by the reinsurance agreement, and the reinsurer agreed to bear its proportionate share of all losses and loss adjustment expenses. The reinsurer also agreed to pay the ceding company a ceding commission equal to 42 percent of the net premiums received. For convenience, it was agreed the ceding company would remit to the reinsurer only the net amount of the gross premiums less the ceding commission and the reinsurer's share of any losses and loss adjustment expenses. The second situation was similar to the first, except the agreement merely called for the ceding company to pay the reinsurer an amount equal to 58 percent of the net premiums attributable to the reinsurer's share of the risk.

The IRS concluded that in "determining the amount of a premium paid … the law does not provide for reduction of the gross premium paid for expenses incurred in connection with underwriting the taxable insurance contract." Thus, the premium excise tax applied to the proportionate share of the premiums received by the ceding company that were attributable to the foreign reinsurer not reduced by any ceding commission, losses, or loss adjustment expenses. In the second situation, the premium excise tax still applied to the proportionate share of the gross premiums received by the ceding company, even though the reinsurance agreement required payment of only a net amount. The IRS stated the same conclusions would apply to modified coinsurance.

By its terms, Rev. Rul. 79-138 applies to coinsurance and modified coinsurance, but not to funds withheld reinsurance. The issue with funds withheld reinsurance is determining when there is a payment to which the premium excise tax applies. The revenue ruling concludes that when there is an actual payment and expense items that are obligations of the reinsurer (such as losses and loss adjustment expenses) are netted against premiums otherwise due the reinsurer, the premium excise tax applies to the gross amount of the payment made by the ceding company. To the extent this holding states that a cash basis taxpayer will be considered to have paid an amount in circumstances in which there are concurrent debits and credits to a cash basis taxpayer's account, it merely restates the well-established proposition discussed above.[25] To the extent it holds that the premiums paid by the ceding company should be determined without reduction for the ceding commissions due from the reinsurer, it is asserting a position contrary to *National Capital Insurance Co*., which held that premiums paid to a reinsurer should be computed net of ceding commissions.[26] In such a case there is no actual payment. In any event, in the case of funds withheld reinsurance, the types of offset contemplated by the revenue ruling do not normally occur immediately upon entry into a reinsurance agreement, which is why Rev. Rul. 79-138 addresses only coinsurance and modified coinsurance.

TERMINATION

The audit technique guide states that when there is a cancellation of a policy, amounts that are refunded or credited are return premiums that result in a reduction in the premium subject to the premium excise tax.[27] Under the IRS position, the ceding company will have paid the premium excise tax on the entire initial premium. However, when the reinsurance agreement is terminated, as is likely to happen, a portion of the funds withheld may be "returned" to the ceding company. If the IRS position is followed and the premium excise tax is imposed on an accrual basis, then the excise tax is negated to the extent it is later determined the funds withheld are returned. That is, the IRS position inappropriately requires that the premium excise tax be paid on too large an amount in the first instance, only to have a portion of that premium excise tax credited or refunded when the reinsurance agreement is subsequently terminated.[28] The taxpayer position discussed above avoids this issue by having the ceding company pay the premium excise tax only on actual payments.

CONCLUSION

The IRS's position on the application of the premium excise tax to funds withheld reinsurance is clearly expressed in the 2008 audit technique guide—an accrual concept applies. The soundness of that position is less clear. Taxpayers that determine the excise tax by looking only to actual payments made by the ceding company to the reinsurer or to the net amount of the ceded premiums after adjusting for the allowance paid by the reinsurer have a variety of arguments to support their position. The language of the premium excise tax, the regulations thereunder, the legislative history of the provision, and the very nature of an excise tax all support the position that the tax applies only when there is an actual payment. Other Code provisions that use similar language as well as the Supreme Court also support this view.

Nevertheless, taxpayers that take a position that the excise tax applies to something less than all amounts due to the reinsurer for which all events have occurred that fix the reinsurer's right to the premiums and the amount of which is reasonably ascertainable should expect the IRS to challenge that treatment. The discussion of this issue in the audit technique guide suggests the IRS is prepared to raise this issue on audit. In time, increased attention may result in greater clarity, but for now it remains an area of potential dispute.

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END NOTES

[1] War Revenue Act of 1917, Pub. L. No. 65-50, § 504, 40 Stat. 300, 315 (1919).

[2] Unless otherwise indicated, all section references are to the Internal Revenue Code of 1986, as amended (the "Code").

[3] Internal Revenue Service, *Foreign Insurance Excise Tax—Audit Technique Guide* (2008).

[4] *Id.*

[5] The IRS similarly seems to fail to appreciate the differences between income taxes and excise taxes in its position on the cascading premium excise tax as expressed in Rev. Rul. 2008-15, 2008-12 I.R.B. 633, and the audit technique guide. *See* Peter H. Winslow & Biruta S. Kelly, *IRS Foreign Insurance Excise Tax—Audit Technique Guide Presents Questionable Positions*, *Taxing Times*, May 2009, at 48.

[6] Pub. L. No. 89-44.

[7] Pub. L. No. 91-172.

[8] I.R.C. § 404(a) provides for a limitation on the deduction for contributions "paid" by an employer under a pension, annuity, stock bonus, or profit-sharing plan. The regulations provide that deductions under this section are "generally allowable only for the year in which the contribution or compensation is paid, regardless of the fact that the taxpayer may make his returns on the accrual method of accounting." Treas. Reg. § 1.404(a)-1(c).

I.R.C. § 561(a) provides a deduction for certain taxpayers for dividends "paid" in the taxable year. A dividend is considered paid "when it is received by the shareholder." Treas. Reg. § 1.561-2(a)(1). This determination is in no way dependent on the corporation's method of accounting for keeping its books or determining its taxable income. Treas. Reg. § 1.561-2(b).

[9] "The employer is required to collect the tax by deducting and withholding the amount thereof from the employee's wages as and when paid, either actually or constructively. Wages are constructively paid when they are credited to the account of or set apart for an employee so that they may be drawn upon by him at any time although not then actually reduced to possession. To constitute payment in such a case, the wages must be credited to or set apart for the employee without any substantial limitation or restriction as to the time or manner of payment or condition upon which payment is to be made, and must be made available to him so that they may be drawn upon at any time, and their payment brought within his own control and disposition." Treas. Reg. § 31.3402(a)-1(b).

[10] Treas. Reg. § 1.6041-1(h).

[11] Treas. Reg. § 49.4261-1(b).

[12] 429 U.S. 569 (1977).

[13] *See* Eckert v. Burnet, 283 U.S. 140, 141 (1931).

[14] *See, e.g.*, Black Gold Energy Corp. v. Commissioner, 33 F.3d 62 (10th Cir. 1994); Vander Moere v. Commissioner, T.C. Memo 1978-430; Rev. Rul. 81-262, 1981-2 C.B. 164; Rev. Rul. 80-140, 1980-1 C.B. 90.

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END NOTES CONT.

[15] Treas. Reg. § 1.848-2(f)(5). This treatment is illustrated in Treas. Reg. § 1.848-2(f)(9), Example 5, which involves a funds withheld reinsurance agreement in which the reinsurer is credited with an initial premium equal to the ceding company's reserves on the reinsured contracts. The reinsurer makes a loan to the ceding company in the same amount and is issued a note by the ceding company. The loan is netted against the reinsurance premium for I.R.C. § 848 purposes. Consequently, immediately after the agreement is entered into, no net consideration has been provided. As discussed in more detail in the next section of this article, the ceding company's issuance of the note does not constitute a payment for tax purposes.

[16] Belcher Est. v. Commissioner, 83 T.C. 227 (1984); Spiegel Est. v. Commissioner, 12 T.C. 524 (1949), *acq.*, 1949-2 C.B. 3.

[17] Don E. Williams, 429 U.S. 569 (1977); *see also* Helvering v. Price, 309 U.S. 409 (1940); Eckert v. Burnett, 283 U.S. 140 (1931); Foley v. Commissioner, T.C. Memo 1976-60; Rev. Rul. 76-135, 1976-1 C.B. 114.

[18] *E.g.*, Carroll v. Commissioner, 30 T.C.M. 249, 254-55 (1971); Jergens v. Commissioner, 17 T.C. 806, 808-09 (1951), *acq.*, 1952-1 C.B. 2.; Rosenblatt v. Commissioner, 16 T.C. 100, 104-05 (1951); Reynolds v. Commissioner, 44 B.T.A. 342, 355-56 (1941), *acq.*, 1941-2 C.B. 11.

[19] *See* Sherman v. Commissioner, 18 T.C. 746 (1952) (holding that a taxpayer was entitled to an interest deduction when a creditor foreclosed on collateral securing the loan on which the taxpayer owed the interest and applied the proceeds against the interest owed), *acq.*, 1952-2 C.B. 3, *acq. withdrawn on other issue and nonacq. substituted,* 1964-2 C.B. 9.

[20] *Jergens*, 17 T.C. at 809.

[21] 1977-2 C.B. 236.

[22] G.C.M. 37,201 (July 26, 1977).

[23] 1979-1 C.B. 359.

[24] *See* Colonial Surety Co. v. United States, 178 F. Supp. 600, 602 (Ct. Cl. 1959).

[25] *See, e.g., Jergens,* 17 T.C. at 808-09; Rosenblatt v. Commissioner, 16 T.C. 100, 104-05 (1951).

[26] 28 B.T.A. 1079 (1933). G.C.M. 37,201 (July 29, 1977), which was prepared in connection with Rev. Rul. 79-138, contends that the case does not control because of a subsequent change in the predecessor to I.R.C. § 832 that it argues would have resulted in a different outcome.

[27] *See also* Rev. Rul. 66-197, 1966-2 C.B. 478 (stating that the taxpayer may either claim a credit for the resulting excise tax overpayment on his next quarterly excise tax return or file a claim for refund).

[28] In addition, the IRS position may create a statute of limitations issue if the ceding company seeks a refund of the "excess" portion of the initial excise tax payment.