

**DESCRIPTION OF CHANGES TO JCX-62-97 MADE BY THE AMENDMENT IN
THE NATURE OF A SUBSTITUTE TO BE OFFERED BY CHAIRMAN ARCHER**

1. Expansion of Authority to Award Costs and Certain Fees

Present Law

Any person who substantially prevails in any action by or against the United States in connection with the determination, collection, or refund of any tax, interest, or penalty may be awarded reasonable administrative costs incurred before the IRS and reasonable litigation costs incurred in connection with any court proceeding. In general, only an individual whose net worth does not exceed \$2 million is eligible for an award, and only a corporation or partnership whose net worth does not exceed \$7 million is eligible for an award.

Once a taxpayer has substantially prevailed over the IRS in a tax dispute, the IRS has the burden of proof to establish that it was substantially justified in maintaining its position against the taxpayer. A rebuttable presumption exists that provides that the position of the United States is not considered to be substantially justified if the IRS did not follow in the administrative proceeding (1) its published regulations, revenue rulings, revenue procedures, information releases, notices, or announcements, or (2) a private letter ruling, determination letter, or technical advice memorandum issued to the taxpayer.

Description of Amendment in the Nature of a Substitute

The original proposal would, among other items, move the point in time at which both the position of the United States is determined and after which reasonable administrative costs can be awarded to also encompass the date on which the first letter of proposed deficiency which allows the taxpayer an opportunity for administrative review in the IRS Office of Appeals is sent, provided that (for purposes of this rule only) there was no reasonable basis for the position of the United States. The amendment in the nature of a substitute would delete the requirement that there was no reasonable basis for the position of the United States.

Effective Date

The provision would apply to costs incurred and services performed more than 180 days after the date of enactment.

2. Suspension of Statute of Limitations on Filing Refund Claims During Periods of Disability

Present Law

In general, a taxpayer must file a refund claim within three years of the filing of the return or within two years of the payment of the tax, whichever period expires later (if no return is filed, the two-year limit applies) (sec. 6511(a)). A refund claim that is not filed within these time periods is rejected as untimely.

There is no explicit statutory rule providing for equitable tolling of the statute of limitations. Several courts have considered whether equitable tolling implicitly exists. The First, Third, Fourth, and Eleventh Circuits have rejected equitable tolling with respect to tax refund claims. The Ninth Circuit has permitted equitable tolling. However, the U.S. Supreme Court has reversed the Ninth Circuit in U.S. v. Brockamp¹, holding that Congress did not intend the equitable tolling doctrine to apply to the statutory limitations of section 6511 on the filing of tax refund claims.

Description of Amendment in the Nature of a Substitute

The amendment in the nature of a substitute is the same as the original proposal (except for the effective date described below). The original proposal would permit equitable tolling of the statute of limitations for refund claims for the period of time during which an individual taxpayer is unable to manage his or her financial affairs by reason of a medically determinable physical or mental impairment that can be expected to result in death or to last for a continuous period of not less than 12 months. Proof of the existence of the impairment must be furnished in the form and manner required by the Secretary. Tolling would not apply during periods in which the taxpayer's spouse or another person is authorized to act on the taxpayer's behalf in financial matters.

Effective Date

The original proposal would apply to claims for credit or refund for periods ending after the date of enactment. The amendment in the nature of a substitute would apply to periods of disability before, on, or after the date of enactment but would not apply to any claim for credit or refund which (without regard to the provision) is barred by the statute of limitations as of January 1, 1998.

¹ 117 S. Ct. 849 (1997), reversing 67 F. 3d 260 and 70 F. 3d 120.

3. Elimination of Interest Differential on Refunds Payable to Individuals and Other Noncorporate Taxpayers

Present Law

A taxpayer that underpays its taxes is required to pay interest on the underpayment at a rate equal to the Federal short term interest rate (AFR) plus three percentage points. A taxpayer that overpays its taxes receives interest on the overpayment at a rate equal to the Federal short term interest rate (AFR) plus two percentage points.

Description of Amendment in the Nature of a Substitute

The amendment in the nature of a substitute would add a new provision that would provide that the overpayment interest rate would be AFR plus three percentage points, except that for corporations, the rate would remain at AFR plus two percentage points.

Effective Date

The provision would apply to interest for calendar quarters beginning after the date of enactment.

4. Penalty for Failure to Pay Taxes Capped for Individuals Making Installment Payments

Present Law

Taxpayers who fail to pay their taxes are subject to a penalty of one-half percent per month on the unpaid amount, up to a maximum of 25 percent (sec. 6651(a)). Taxpayers who make installment payments pursuant to an agreement with the IRS (under section 6159) are also subject to this penalty.

Description of Amendment in the Nature of a Substitute

The amendment in the nature of a substitute would add a new provision that would provide that the penalty for failure to pay taxes would not be imposed with respect to the tax liability of an individual with respect to any month in which an installment payment agreement with the IRS (under section 6159) is in effect to the extent that doing so would result in the cumulative penalty percentage exceeding 9.5 percent (instead of 25 percent).

Effective Date

The provision would be effective for installment agreement payments made after the date of enactment.

5. Disclosure of Field Service Advice

Present Law

In Tax Analysts v. IRS,² the court held that the Freedom of Information Act requires field service advice memoranda issued by the National Office of Chief Counsel of the Internal Revenue Service to field personnel to be open to public inspection. Section 6103 of the Code prohibits the disclosure of tax return information. Statutory procedures do not currently exist for insuring taxpayer privacy while allowing the public inspection of field service memoranda.

Description of Amendment in the Nature of a Substitute

The original proposal would have generally established a structured process for making certain field service memoranda available for public inspection while also providing taxpayers an opportunity to participate in the process of identifying tax return information that should not be subject to disclosure. The amendment in the nature of a substitute deletes this provision.

² 117 F. 3d 607 (D.C. Cir. 1997).