SCENE: Hypothetically, we’re in the future. The LB&I policy of not accepting affirmative, informal claims has been in place in the same manner as proposed, i.e. that the taxpayer has to assert any informal claims within 30 days of the starting date of the examination in \_\_[insert date in future]\_\_\_\_\_\_\_\_\_\_.

The scene takes place in the law office of the firm that represents the taxpayer. The Rep is meeting with the VP of tax, also an attorney but no longer practicing since he became the VP of tax.

The tax year 2012 is currently under examination and the discussion is about a claim for refund that was discovered during the examination but 9 months after the start of the examination for that tax year.

The VP of tax wants advice regarding an informal claim that they filed with the Examination team handling their current audit.

VP tax: We’re under examination for our 2012 tax year and the Exam team wants us to agree to an extension of the statute of limitations since it’s going to take more time for them to finish the examination. I think we’ll have to agree to the extension but I also wanted to talk about a claim for refund that we discovered for that year.

Rep: When did you file the return for that year?

VP: We’re on a calendar year end and we timely filed our 1120 return under extension on September 15 of 2013.

Rep: The statute of limitations for assessment runs 3 years from when the return was filed so that statute will run on September 15, 2016.

VP: What about the statute of limitations for making a claim for refund? Back when I was practicing I recall the statute of limitations for the IRS to assess tax to be a little different from the statute of limitations for making a claim for refund and I even remember that it’s under Code section 6511.

Rep: That’s right. The general statute of limitation for making a claim for refund under section 6511 is 3 and 2. Three years from the date the return was filed or 2 years from the time the tax was paid, whichever is later. Did you pay the tax or was it deemed paid at the time you filed the return?

VP: We made estimated payments during the tax year and made our final payment when we filed for the extension to file the return and we didn’t make any payments for that tax year after that. So, given the rule of 3 and 2 under section 6511, the statute of limitation for making this claim runs on September 15, 2016 – 3 years from when we filed the return under the extension. What happens if we agree to an extension to assess for that year? Isn’t there a different time period for making a claim for refund if we agreed to extend the assessment period?

Rep: Under the Code the claim for refund would be timely if made within 6 months after the extended period for assessment has run.

VP: Well that shouldn’t be a problem since we already sent the team an email about the claim.

Rep: So you did this in the context of the ongoing examination?

VP: Yes, we sent the Examination team leader an email in which we told her that in collecting information to respond to one of the Information Document Requests she sent us we had discovered an issue that we believe entitles us to a refund of tax for the 2012 tax year.

Rep: What else did you tell her in the email?

VP: We told her that for 2012 we had understated some deductions that we believe resulted in a substantial overpayment of tax for that year and that the Exam team should investigate it.

Rep: You say you’re currently under examination for the 2012 tax year?

VP: Yes.

Rep: Did you get a response back from the team on the email?

VP: Yes, the team leader told us and then sent a confirming email that because of the current guidance on the examination process that LB&I examiners follow which went into place before the audit of the 2012 tax year started, we had not timely made the affirmative claim for relief and she rejected it. I wasn’t sure what she meant by not timely made given that we’re still under examination for that tax year and the statute of limitation is still open.

Rep: When did that examination start?

VP: Well as you may know, we’re under continuous audit and we got the notice that the Exam team was starting the audit of the 2012 tax year a little over 9 months ago.

Rep: What the Exam team leader is referring to is a directive that LB&I issued stating that, if a taxpayer is under audit, any affirmative claims for refunds had to be made to the Exam team within 30 days of when the audit started. If not made within that initial 30 day period, the Exam team would not consider the informal claim and the taxpayer would have to file a formal amended return claiming the refund; in your case an 1120X.

LB&I issued a notice back in November, 2014 proposing this procedure that required taxpayers to submit the informal claim to the Exam team within the first 30 days of the examination and asked for comments about that proposal. There were a number of comments before this became final, some of which noted that the time was too short and others noted that there should be exceptions to any hard-fast rule. A couple of comments asked that there be an exception if the basis for the claim was not discovered until after the 30 days had run. LB&I rejected all of the suggestions and kept the hard-fast rule that such affirmative claims had to be made within that initial 30 days after the examination started otherwise the Exam team would not consider the claim forcing the taxpayer to file a formal claim.

VP: How could this be fair since we didn’t even discover the basis for the claim until we were almost 3 months into the examination. We had no idea that it existed before we gathered the information to answer that IDR.

Rep: Has the Exam team looked at the issue that is the basis for the refund claim?

VP: No, as I said it’s something that we just discovered when we were responding to one of the IDRs that we’re dealing with now.

Rep: So, at this point, you think you have a valid claim that will result in an overpayment of tax for 2012. You’re an attorney so you’ll understand the legal precedent that exists regarding filing an informal claim. The cases dealing with making informal claims note three things: (1) the issue of whether an informal claim has been filed is one of fact; (2) the informal claim must be in writing or have a written component; and (3) the matters set forth in the writing must have been sufficient to apprise the Service that a refund is sought and to focus attention on the merits of the dispute so that an examination of the claim may be commenced if the Service wishes. My research uncovered a couple of cases on this point American Radiator & Standard Sanitary Corp. v. United States, a 1963 Claims Court case and a 1982 case out of that same court, Furst v. United States.

Additionally, some courts have found that there also needs to be some evidence of a waiver by the IRS of the formal claim requirements that are set forth in the regulations, such as evidence that the IRS accepted and treated the informal claim as a claim for refund, notwithstanding the fact that the informal claim did not meet the formal requirements. I’m thinking of a US Supreme Court case back in 1945 Angelus Milling Co. v. US.

As to the first item, it sounds like you have a claim that is factual – you discovered some overlooked deductions. As to the second point - you sent an email so it was written. On the third point, from what you’ve told me you provided the team enough info to apprise them of the issue – deductions; the tax year – the year under examination 2012, and I assume that you gave them enough details so that they could decide whether to examine the issue. Consequently, I think you filed a good informal claim.

VP: So what do we do now? Have we done all we can to make sure we have made a valid claim for refund?

Rep: The leading case on this is US v. Kales. A 1941 US Supreme Court case that said that a notice that fairly advises the IRS “…***of the nature of the taxpayer's claim, which the IRS could reject because it is too general or because it does not comply with the formal requirements of the statute and regulations, will nevertheless be treated as a claim, where formal defects and lack of specificity have been remedied by amendment filed after lapse of the statutory period.***" In making that statement the Kales Court was citing to an earlier, 1933 US Supreme Court case US v. Memphis Cotton Oil Co.

In your case, as I just explained, I believe the email you sent to the Exam team leader was sufficient to qualify as a valid informal claim. However, the Exam team rejected the claim made in the email because it had not been made within 30 days of when the examination of the 2012 tax year started. They made no statement or indicated in any way that they were disallowing the claim on the merits?

VP: That’s right. All she said was they were not going to consider it because it was not given to them within that initial 30 day period and therefore we had to file a formal amended return, 1120X to make the claim.

Rep: There are a couple of additional questions that come to mind given what has happened here:

First, can the Examination team choose not to consider the affirmative claim since the tax year is already under examination?

Second, let’s assume that they **can** refuse to consider this claim during the examination process. The law requires a taxpayer to bring suit on a disallowed claim for refund within 2 years of the disallowance under Code section. Does their refusal to consider the claim constitute a disallowance so that the time for bringing suit starts to run when they told you they would not consider it during the examination?

On the first question I believe that the Examination team does have the discretion not to consider the claim. [Can we find some guidance on this point]

As to the second point, under Code section 6532 the 2 year period to file suit doesn’t start to run until the IRS mails “…***by certified mail or registered mail … to the taxpayer of a notice of the disallowance of the part of the claim to which the suit or proceeding relates.”*** In your case the Exam team leader telling you or even emailing you that they were not going to consider your claim and that you had to file a formal claim is likely not to be considered enough to trigger the start of the 2 year period to file suit. However, you may not want to take that chance.

VP: Let me think about it and I’ll let you know what I decide to do.

**Questions for the audience:**

1. Do you recommend that the client file the formal 1120X and make certain that a valid formal claim has been made?
2. Does that then start the 6 months running so that after that time the client can file suit?
3. What happens if the IRS did not consider the claim? Does this impact what the courts will do with the informal claim?
4. Let’s assume that the informal claim was defective. Assume that the email the VP sent the Exam team did not have all of the information that would qualify it as an adequate informal claim under Kales.
   1. What would happen then?
   2. What would you recommend to your client or what position would you take if you’re on the Government side?

Finally, change the hypo slightly so that the taxpayer did in fact file a formal claim for refund, 1120X, with the same claim as the affirmative that was rejected and the IRS formally sends out a written disallowance as specified in 6532.

1. Does the time start to run for the 2 year period to file suit from this formal disallowance or can the IRS say the 2 years starts from the time of the rejection by the Team Leader.

See Code section 6532(a)(4) talks about more than one consideration and disallowance by the IRS and which one starts the 2 year period for filing suit. “***Any consideration, reconsideration, or action by the Secretary with respect to such claim following the mailing of a notice by certified mail or registered mail of disallowance shall not operate to extend the period within which suit may be begun.”*** Presumably a formal disallowance is needed for this to kick in.