# Recent Developments to Consider when Filing Formal and Informal Claims for Refund

By Gerald A. Kafka and Paul B. Hynes, Jr.

Corporate taxpayers are filing more claims for refund — often on an informal basis — and two recent developments significantly affect the procedural and strategic considerations that govern the filing of such claims. Although practical reasons, such as the discovery of new facts or the publication of new taxpayer-favorable authority, often dictate the reporting of a position on a claim for refund instead of an original tax return, there are numerous strategic reasons for this course of conduct as well. A refund claim is not subject to the accuracy-related and fraud penalties under sections 6662, 6662A, and 6663 of the Internal Revenue Code of 1986, as amended. In addition, refund claim positions are not subject to the same disclosure obligations as positions reported on an original return, *e.g.*, disclosure under Financial Accounting Standards Board Interpretation No. 48 (ASC 740-10), on Schedule M-3 ("Net Income (Loss) Reconciliation for Corporations with Total Assets of $10 Million or More"), or on new Schedule UTP ("Uncertain Tax Position Statement").

Because of the computational and other reporting burdens associated with filing a formal Form 1120X, most corporate taxpayers use the device of an "informal claim," which typically consists of a one- or two-paragraph explanation without accompanying tax computation that is submitted by hand to a revenue agent during the course of an audit. That an informal claim can provide a valid jurisdictional basis for a refund as long as it satisfies certain informational requirements, or the Internal Revenue Service waives the technical deficiencies as to form and content by considering the merits of the claim, is well established. From a taxpayer's perspective, an informal claim minimizes the time and expense of preparing a formal refund claim and is often encouraged — if not requested — by revenue agents.

There are two developments that corporate taxpayers should consider when preparing to file formal and informal refund claims.

(1) Several of the U.S. Courts of Appeals and the U.S. Court of Federal Claims have recently upheld the government's position that an informal claim is jurisdictionally inadequate if the taxpayer does not "perfect" the claim (by filing a complete formal refund claim) before the IRS rejects it, unless there is unequivocal evidence that the IRS has waived the technical deficiencies in an informal claim by considering it on the merits.

(2) On May 25, 2007, Congress enacted section 6676 of the Code to impose a penalty on any taxpayer who files a refund claim for an "excessive amount" (defined as the disallowed portion of the claim) unless the taxpayer has a "reasonable basis" for such amount. Although the IRS has not published Treasury Regulations or any other guidance under section 6676, there have been reports that the IRS has aggressively asserted the new penalty, which is equal to 20 percent of the disallowed amount.

The recently circumscribed perfection requirement and new section 6676 penalty complicate the process of filing formal and informal claims for refund. In the absence of administrative guidance on the circumstances in which the IRS will assert the section 6676 penalty, it remains uncertain whether the IRS will assert the penalty only against formal claims or, alternatively, against informal claims, too. If the IRS pursues the latter approach, taxpayer will find themselves in the awkward position of arguing that their disallowed, informal claims were jurisdictionally *inadequate*, an argument that the government has historically made in motions to dismiss refund suits premised on an informal claim. This suggests a strategy by taxpayers to mitigate the risk of a section 6676 penalty by filing an informal claim and waiting to perfect it until after the IRS has indicated it is predisposed to allow the claim. This approach would allow a taxpayer time to evaluate the merits of the informal claim, its likelihood of proceeding to litigation, and other considerations that may affect whether the taxpayer wants to receive a formal claim disallowance and, with it, exposure to a section 6676 penalty.

## Judicial Decisions Requiring Perfection of an Informal Claim for Refund

The requirement that a taxpayer file a timely claim for refund to recover a tax refund is statutory.[1] By contrast, the form and content of a refund claim are governed by the Treasury Regulations,[2] and courts have long held that a taxpayer need not file a formal refund claim in the manner prescribed by the regulations where (i) the taxpayer files an informal claim that satisfies the essential informational requirements of the regulations,[3] or (ii) the IRS waives any technical deficiencies by considering the merits of an informal claim.[4] Recently, courts have held that in those situations where the IRS has not waived the technical deficiencies, an informal claim is insufficient for jurisdictional purposes if the taxpayer did not perfect the claim.

### A. Traditional Requirements for an Informal Claim

There are "no set rules … as to what constitutes an adequate informal claim," and "each case must be determined based on its own unique set of facts."[5] The courts, particularly the U.S. Court of Federal Claims, have historically required that an informal claim (i) provide notice to the IRS that the taxpayer is asserting a right to a refund,[6] (ii) include a description of the legal and factual basis for the refund,[7] and (iii) have a written component.[8] The underlying purpose of these requirements is to put the IRS on "notice of what the taxpayer is claiming and that [the taxpayer] is in fact making a claim for refund."[9]

### B. The Perfection Requirement

Recently, several Circuits and the Court of Federal Claims

have held that, in addition to the above requirements, a taxpayer must perfect an informal claim after the lapse of the statutory period but before the IRS has rejected the claim. A taxpayer perfects an informal claim by filing a "formal claim that remedie[s] any defects in the informal claim."[10] The principal cases may be summarized in chronological order, as follows:

- **Fifth Circuit.** In *PALA, Inc. Empl. Profit Sharing Plan and Trust Agreement v. United States*, the Fifth Circuit held that the taxpayer's letter to the IRS, which provided "ample notice" of a right to a refund, did not constitute an informal claim in part because it "was not subsequently amended by a formal claim."[11]
- **Eighth Circuit.** After stating that an "informal claim … must have been followed by a formal claim that remedied any defects in the informal claim," the Eighth Circuit found that the taxpayers in *Kaffenberger v. United States* properly perfected their informal claim (which had been made on an automatic extension request directing the IRS to apply a refund of their estimated tax overpayments for the tax year in question to the subsequent year) by filing a late original return (which was prepared by the IRS) for the tax year in question.[12]
- **Ninth Circuit.** Finding "no evidence that [the taxpayer] made a technically-deficient claim within the statutory period," the Ninth Circuit stated in *Commissioner v. Ewing* that "any such informal claim 'must have been followed by a formal claim that remedied any defects in the informal claim.'"[13]
- **Seventh Circuit.** In *Greene-Thapedi v. United States*, a pro se taxpayer sued for refund of a 1999 overpayment that the IRS had applied against a 1992 tax liability, and after the district court held that "her Tax Court petition concerning her 1992 taxes … and the refund claim for her 1999 overpayment" constituted a "sufficient informal claim for refund of her 1992 overpayment," the Seventh Circuit reversed on the ground that the taxpayer's "subsequent failure to file a formal claim barred the court from exercising any jurisdiction over the claim."[14]
- **Court of Federal Claims.** Although the taxpayer's facsimile transmittal and telephone conversations with the IRS in *Pennoni v. United States* "were sufficient to meet the criteria for an informal claim," the Court of Federal Claims held that it "lack[ed] subject matter jurisdiction to consider his claim" because "the [taxpayer] failed to perfect his informal claim for a refund by filing a formal claim with the IRS."[15]

District courts in the Second and Fourth Circuits have likewise held that a taxpayer must perfect an informal claim.[16]

The courts have relied on three principal grounds for requiring perfection. First, the courts have cited *Kales v. United States*, the seminal case on informal claims, in which the Supreme Court stated:

> This Court, applying the statute and regulations, has often held that a notice fairly advising the Commissioner of the nature of the taxpayer's claim, which the Commissioner could reject because 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 the lapse of the statutory period*.[17]

The lower courts have observed that "the Supreme Court has endorsed informal claims … as long as a valid refund claim is subsequently made after the period has run,"[18] and that "the [informal claim] doctrine is predicated on an expectation that the[] formal deficiencies will at some point be corrected."[19] Second, the courts have equated informal claims with "pleadings, for which technical deficiencies generally can be corrected by amendment so as to relate back to the original date of filing suit."[20] Third, the courts have reasoned that requiring subsequent compliance with the regulatory requirements concerning form and content provides the IRS with "a full opportunity to address the problem administratively," and that "[t]o hold otherwise would eliminate, as a practical matter, the formal claim requirement."[21]

### C. Perfection Not Required Where the IRS Has Waived the Technical Deficiencies in an Informal Claim

None of the cases requiring perfection has involved a situation where the IRS considered the merits of an informal claim and thereby waived the technical deficiencies. In *United States v. Memphis Cotton Oil*, an important case on waivers, the Supreme Court stated that "a defective claim for refund will not supply a basis for a suit against the government when there has been *neither waiver by the Commissioner nor amendment by the taxpayer.*"[22] Based in part on *Memphis Cotton Oil*, courts have held that a taxpayer will not be barred from recovery for failing to file a claim for refund in the form and manner prescribed by Treasury Regulations if the IRS has waived the technical deficiencies by considering the claim on its merits.[23] Informal guidance issued by the IRS is consistent on this point:

> [A]n informal written refund claim will toll the [limitations] period if … either the IRS waives the defect by considering the refund claim on its merits or the taxpayer subsequently perfects the informal refund claim by filing a formal refund claim before the IRS rejects the informal refund claim.[24]

In sum, timely perfection of an informal claim is required to establish the taxpayer's jurisdictional entitlement to a refund, unless the IRS waives the technical deficiencies in an informal claim by considering the merits of the claim.

## Section 6676 Penalty for an Erroneous Claim for Refund

Congress enacted the section 6676 penalty of the Code to deter erroneous refund claims. Section 6676(a) imposes a penalty on any taxpayer who files a claim for refund or credit of income tax for an excessive amount unless the taxpayer has a reasonable basis for such amount. Although the IRS has not published any formal administrative interpretation of the penalty, it has issued internal guidance on various procedural issues for which there is no statutory directive, including the IRS's position that the statute of limitations for assessing the penalty is three years from the date of the claim for refund or credit.[25]

### A. Legislative Purpose of the Section 6676 Penalty

Congress enacted section 6676 on May 25, 2007, as part of the Small Business and Work Opportunity Act of 2007 (the 2007 Act), effective for any claim filed after that date.[26] The 2007 Act was part of an emergency appropriations bill, H.R. 2206.[27] Because the 2007 Act was part of an emergency appropriations bill, there is no legislative history specifically relating to new section 6676 as part of the 2007 Act. The legislative history to the predecessor bill, however, provides that Congress intended section 6676 to "improve the overall functioning of the tax system by deterring erroneous refund claims."[28]

Congress referred to "certain refund schemes" that, according to a report by the Treasury Inspector General for Tax Administration (TIGTA), had "overwhelmed IRS resources to the point where the IRS was unable to prevent the issuance of erroneous refunds."[29] The TIGTA report focused on false refund claims submitted by prisoners, which had increased from 4,300 in 2002 to more than 18,000 in 2004, and a fraudulent scheme involving more than 70,000 returns that used fictitious information on Schedule C ("Profit or Loss from Business") to claim the earned income tax credit.[30] Based in part on that report, Congress found that refund claims with "no reasonable basis in law … strain[] IRS resources and imped[e] effective tax administration."[31] Previously, there was "very little expected cost to the taxpayer who file[d] an erroneous refund claim," since the cost for receiving an erroneous refund was generally limited to repayment of the refund plus interest, and Congress concluded that enacting the section 6676 penalty would "increase the cost of such behavior."[32]

In addition to prisoner claims, the new penalty was apparently also intended to apply to research credit claims. Indeed, the Industry Director Directive #2 on Research Credit Claims is unique among the Tier I audit issue directives in requiring that examiners consider a section 6676 penalty where a taxpayer's research credit, whether reported on an original return or refund claim, is disallowed in part or in full.[33]

### B. Administrative Guidance on the Section 6676 Penalty

The IRS has not published any formal guidance on the section 6676 penalty, but the item has been on the Treasury Department guidance plan for more than 18 months.[34] The IRS has issued limited informal guidance on the penalty, including Internal Revenue Manual (IRM) §§ 20.1.5.14, *et seq*. ("IRS Section 6676: Erroneous Claim for Refund or Credit"), which addresses various issues relating to the penalty other than the "reasonable basis" defense, and Chief Counsel Advice Memorandum (CCA) 200747020,[35] the unredacted portion of which addresses how the penalty is computed (an issue over which there should be no dispute).

The Small-Business/Self-Employed Division's Examination Policy, Servicewide Penalties office also issued internal guidance in the form of "Frequently Asked Questions" on July 31, 2009 (IRS FAQs) to identify and address some of the potential procedural issues.[36]

### C. How the Section 6676 Penalty Works

1. **The penalty applies to a claim for refund or credit of excess income taxes only.** Under section 6676(a), the penalty may be asserted against "a claim for refund or credit with respect to income tax (other than a claim for refund or credit relating to the earned income credit under section 32) … for an excessive amount." Thus, the penalty may not be asserted against a claim for refund or credit of employer, excise, or other taxes for an excessive amount.[37]

2. **The penalty applies to the "excessive amount" of the claim for refund or credit, which is defined as the disallowed portion of the claim**. Section 6676(b) defines the term "excessive amount" as the "amount by which the amount of the claim for refund or credit for any taxable year exceeds the amount of such claim allowable under this title for such taxable year." In other words, the excessive amount is the "disallowed portion of the claim for refund or credit,"[38] and it includes credit offsets.[39]

Under section 6676(a), the penalty is "equal to 20 percent of the excessive amount." The IRS has provided the following "simple formula" for computing the penalty:

X = amount of claim for refund or credit requested
Y = amount of claim for refund or credit allowed
20%(X-Y) = amount of the section 6676 penalty.[40]

In other words, under the statutory scheme, there is no margin for error. If an insignificant amount of a claim for refund or credit is disallowed and the IRS finds that the taxpayer did not have a reasonable basis for claiming such amount, it may assert a section 6676 penalty against the taxpayer.

3. **The penalty does not apply to any disallowed portion of a claim for refund or credit that has a "reasonable basis," a term that has not yet been defined for purposes of section 6676.** Section 6676(a) provides that a taxpayer is not liable for the penalty "if it is shown that the claim for [an] excessive amount has a reasonable basis." Neither the Code, the legislative history, nor the informal administrative guidance to date, however, defines or interprets "reasonable basis." According to the IRM and public statements of senior IRS officials, the forthcoming proposed Treasury Regulations will provide guidance on reasonable basis.[41]

Indications are that, until further guidance is issued, the IRS will rely on the definition of reasonable basis in the regulations promulgated under section 6662, relating to the accuracy-related penalty.[42] According to those regulations, reasonable basis is "significantly higher than not frivolous or not patently improper" and is not satisfied by a claim that is "merely arguable or … colorable."[43]

4. **The penalty also does not apply to any disallowed portion of a claim for refund or credit that is subject to accuracy-related or fraud penalties.** Section 6676(c) provides that the penalty does "not apply to any portion of the excessive amount … which is subject to a penalty imposed under part II of subchapter A of chapter 68." Those penalties are the section 6662 accuracy-related penalty on underpayments, section 6662A accuracy-related penalty on un-

derstatements from reportable transactions, and the section 6663 fraud penalty.

Significantly, the section 6676 penalty may be applied against a claim for refund *or* credit, and the IRS takes the position that the penalty may be asserted against "any income tax return, whether original or amended, or other form, provided that the return or form presents a claim for refund or credit for an excessive amount."[44] Where multiple penalties apply (*e.g.*, a research credit reported on an original return is disallowed), the IRS apparently will assert the section 6676 penalty instead of the other penalties, stating that "[n]otwithstanding IRC section 6676(c), [it] has the sole discretion and authority to impose the penalty in the context of other penalties."[45]

5. **The penalty is an assessable penalty that is not subject to deficiency procedures.** Section 6676 is codified under Subtitle F, Chapter 68, Subchapter B of the Code, which is entitled "Assessable Penalties." Therefore, the penalty is not subject to deficiency procedures, and a statutory notice of deficiency is not required before the penalty is assessed.[46] The IRS has stated, however, that the penalty is subject to pre-assessment appeal procedures if a taxpayer timely requests reconsideration with the IRS Appeals Office and submits a protest.[47]

Once the penalty is assessed, it must be paid on notice and demand by the IRS in the same manner as a tax. If a taxpayer wishes to further challenge the assessment of the penalty, then the taxpayer must file a refund action in the appropriate U.S. district court or the U.S. Court of Federal Claims.

### D. IRS Assertion of the Penalty to Date

There have been multiple instances in which the section 6676 penalty has been asserted with respect to the research credit. As previously explained, Industry Director Directive #2 on Research Credit Claims provides that the section 6676 penalty "must be addressed in all cases where the RC Claim for refund or credit is disallowed in part or in full." Moreover, the directive requires that examination teams "obtain and document the concurrence from a Technical Advisor where the RC Claim is fully or partially disallowed and the … penalty is not asserted."

In addition, there are other contexts in which the IRS has considered asserting a section 6676 penalty and instances in which the IRS has, in connection with an audit of a claim for refund or credit, issued an Information Document Request for an explanation of the taxpayer's reasonable basis. The American Institute of Certified Public Accountants (AICPA) has reported that it is "aware of section 6676 penalties being imposed automatically and regularly when a claim for refund is denied, without any consideration of whether the position has a reasonable basis."[48] The AICPA attributed this, in part, to the IRS's not having published regulations or other guidance, but also said that the penalty is "another example of a new provision where sufficient training has not been provided."[49] The AICPA may be overgenerous in making these allowances. The reasonable basis standard is well established, and it is hard to imagine that a radically different standard will be articulated in the context of section 6676.

## Practical and Strategic Considerations with Respect to the Perfection Requirement for Informal Claims and the Section 6676 Penalty

### A. To the Extent that the Section 6676 Penalty Applies to an Informal Claim, It May Only Apply to an Informal Claim that Has Been Perfected

Neither the Code nor the legislative history specify whether the section 6676 penalty applies to informal claims for refund. The IRS takes the position that the penalty applies to informal claims, and taxpayers should anticipate that the IRS may assert the penalty against such claims. This issue will likely be addressed in the forthcoming regulations, and there is no reason to expect the IRS to deviate from its current position.

If the penalty applies to informal claims, it should only be applied against an informal claim that satisfies all of the requirements for such a claim. That is to say, the penalty should only be asserted against an informal claim that (i) provides sufficient notice that a taxpayer is asserting a right to a refund, (ii) contains a description of the legal and factual basis for the refund, (iii) has a written component, *and* (iv) is subsequently perfected by a formal claim for refund that remedies the technical defects. In other words, if a taxpayer did not subsequently perfect an informal claim, such that the claim is not valid for jurisdictional purposes, then it should not be subject to a penalty.

### B. Taxpayers May Be Able to Mitigate the Risk of a Section 6676 Penalty by Filing an Informal Claim and Delaying Its Perfection

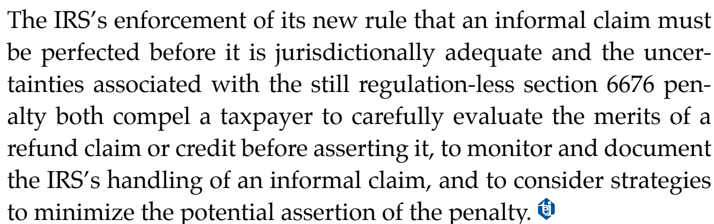
In light of reports that the IRS is "automatically" asserting the penalty when a refund claim is disallowed in part or in full, taxpayers must evaluate the prospects of a claim disallowance and of a section 6676 penalty before filing a refund claim. Because the penalty should not apply to an informal claim that has not been perfected, however, taxpayers may be able to use the perfection requirement to their advantage. Specifically, if there is a risk that the IRS will disallow all or part of a refund claim and find that the "excessive amount" did not have a reasonable basis, the taxpayer should be able to mitigate the penalty exposure by filing an informal claim and delaying action to perfect it. This would allow the taxpayer to evaluate the various factors that affect the likelihood of a disallowance and its ability to demonstrate a reasonable basis. Such factors include administrative guidance and case law that affect the merits of the claim, the IRS's response to similar claims submitted by other taxpayers, and the taxpayer's relationship with its on-site IRS examination team. Waiting to perfect the informal claim would also allow more time for the taxpayer's in-house and outside tax advisers to continue to review the merits of the claim. If the taxpayer chooses to proceed with the refund claim, the taxpayer must timely perfect the informal claim before the IRS rejects it.

There is, of course, the possibility that the IRS will consider the merits of the informal claim, waive the formal claim requirement, and thereby establish a separate basis for the informal claim's validity. In this regard, the courts have required "unmistakable" proof that the IRS "has in fact seen fit to dispense with [the] for-

mal requirements and to examine the merits of the claim."[51] If such proof exists, then the likelihood of a section 6676 penalty may be increased if the claim is disallowed.

## Conclusion

The IRS's enforcement of its new rule that an informal claim must be perfected before it is jurisdictionally adequate and the uncertainties associated with the still regulation-less section 6676 penalty both compel a taxpayer to carefully evaluate the merits of a refund claim or credit before asserting it, to monitor and document the IRS's handling of an informal claim, and to consider strategies to minimize the potential assertion of the penalty.



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1. *See* I.R.C. § 6511(b)(1) ("No credit or refund shall be allowed or made after the expiration of the period of limitations … for the filing of a claim for credit or refund, unless a claim for credit or refund is filed by the taxpayer within such period."); § 7422(a) ("No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.").
2. *See* Treas. Reg. §§ 301.6402-2, 301.6402-3. *See generally Missouri Pac. R.R. v. United States*, 214 Ct. Cl. 623, 628 (1977) ("The requirements imposed by Treasury regulations must be distinguished from those imposed by statute; the former requirements may be waived while the latter may not. In the instant case we are concerned with the statutory requirement of filing a timely claim for refund. … Under the applicable law that requirement cannot be waived.").
3. *See, e.g., United States v. Kales*, 314 U.S. 186, 194-97 (1941); *American Radiator & Standard Sanitary Corp. v. United States*, 162 Ct. Cl. 106, 113-18 (1963).
4. *See, e.g., United States v. Memphis Cotton Oil Co.*, 288 U.S. 62, 72 (1933); *BCS Fin. Corp. v. United States*, 118 F.3d 522, 524 (7th Cir. 1997).
5. *New England Elec. Sys. v. United States*, 32 Fed. Cl. 636, 641 (1995); *see Wall Indus., Inc. v. United States*, 10 Cl. Ct. 82, 98 (1986) ("Save for some sort of a *written component*, the cases in this court emphasize that there is no preconceived set of universal facts and circumstances which otherwise define an efficacious informal claim. … Rather, … each case is to be decided on its own merits, paying particular attention to the combined effect of the unique facts and circumstances known to the government at the time the alleged informal claim is made.") (emphasis in original).
6. *New England Elec. Sys. v. United States*, 32 Fed. Cl. at 641. In determining whether a taxpayer has provided sufficient notice, "[t]he relevant inquiry is the IRS's knowledge." *Mobil Corp. v. United States*, 67 Fed. Cl. 708, 716 n.18 (2005). Constructive notice, however, is sufficient. *Id.* at 716; *see Kaffenberger v. United States*, 314 F.3d 944, 955 (8th Cir. 2003) (looking to whether "the Commissioner knew, or should have known, that a claim was being made").
7. *Mobil Corp. v. United States*, 67 Fed. Cl. at 716 (quoting *New England Elec. Sys. v. United States*, 32 Fed. Cl. at 641). The legal and factual bases must "be described with some degree of specificity, but the taxpayer 'can properly rely on the very specific knowledge gained by the revenue agent in auditing its returns,' as long as that knowledge is obtained within the statute of limitations." *Id.* at 718 (quoting *American Radiator & Standard Sanitary Corp. v. United States*, 162 Ct. Cl. at 115).
8. *Id.* at 716 (quoting *Arch Eng'g Co. v. United States*, 783 F.2d 190, 192 (Fed. Cir. 1986)). The written component "need not contain all of the information necessary to the put the IRS on notice that a refund was being sought" and is "not [to] be given a crabbed or literal reading, ignoring all the surrounding circumstances which give it body and content," as the "focus is on the claim as a whole, not merely the written component." *Kaffenberger v. United States*, 314 F.3d at 955 (quoting *Estate of Hale v. United States*, 876 F.2d 1258, 1262 (6th Cir. 1989)).
9. *Mobil Corp. v. United States*, 67 Fed. Cl. at 717 (quoting *Donahue v. United States*, 33 Fed. Cl. 600, 608 (1995)).
10. *Kaffenberger v. United States*, 314 F.3d at 955.
11. 234 F.3d 873, 878-79 (5th Cir. 2000).
12. 314 F.3d at 954-56 ("At a bare minimum, the Kaffenbergers' informal claim had to contain a written component within the statute of limitations, and must have been followed by a formal claim that remedied any defects in the informal claim."). The taxpayers in *Kaffenberger* had not previously filed an original return, and the IRS treated the late-filed original return as a claim for refund and, in response, issued a formal notice of disallowance.
13. 439 F.3d 1009, 1015 (9th Cir. 2006) (quoting *Kaffenberg v. United States*, 314 F.3d at 955).
14. 2007-1 U.S. Tax Cas. (CCH) ¶ 50,187, 50,188 (N.D. Ill. 2006), *rev'd*, 549 F.3d 530, 533 (7th Cir. 2008). The Seventh Circuit reasoned that "[a]fter the IRS applied [the taxpayer's] overpayment to the 1992 taxable year, the case became a suit for a 1992 refund because it centered on an adjudication of her remaining 1992 tax liability." *Id.* at 532. In this regard, the court noted that although the taxpayer's "original complaint requested a refund for her 1999 overpayment, her amended complaint requested a refund for the 1992 tax year." *Id.*
15. 86 Fed. Cl. 351, 362, 364-65 (2009).
16. *See Gallo v. United States*, 950 F. Supp. 1246, 1249-50 (S.D.N.Y. 1997)

("Although such letter can be viewed as an informal claim, an informal claim merely tolls the statute of limitations for the filing of a proper claim. … Plaintiff has not perfected his informal refund claim and … this Court rejects Plaintiff's argument that his informal refund claim vests subject matter jurisdiction upon the Court."); *Follum v. United States,* 2007 U.S. Dist. LEXIS 64896, *6-*8 (E.D.N.C. August 9, 2007) ("[E]ven if Petitioner's tax returns, the request for hearing or the petition were considered an informal claim for refund, the fact remains that Petitioner has not filed a formal administrative claim…. Because Petitioner has not filed a formal administrative claim, this court lacks subject matter jurisdiction over this action."), *aff'd per curiam*, 267 Fed. Appx. 308 (4th Cir. 2008) (unpublished opinion affirming "for the reasons stated by the district court").

17. 314 U.S. at 194 (emphasis added).
18. *Kaffenberger v. United States*, 314 F.3d at 954.
19. *PALA, Inc. Empl. Profit Sharing Plan and Trust Agreement v. United States,* 234 F.3d at 879.
20. *Id.* (citing Fed. R. Civ. P. 15(c); *Memphis Cotton Oil*, 228 U.S. at 72-73). As the Fifth Circuit cautioned in PALA, "this analogy is not to be so slavishly followed as to ignore the necessities and realities of administrative procedure." *Id.* at 879 n.27 (citing *United States v. Andrews*, 302 U.S. 517, 524 (1938)).
21. *Greene-Thapedi v. United States,* 549 F.3d at 532.
22. 288 U.S. 62, 72 (1933) (emphasis added).
23. *See BCS Fin. Corp. v. United States*, 118 F.3d at 525 ("The [informal claim] doctrine is also one of waiver. What counts as a claim is specified not in the Code itself but in the Treasury regulations; and courts say that the Treasury, through its delegate the IRS, can waive the regulation."); *United States Pipe & Foundry Co. v. United States*, 140 Ct. Cl. 132, 136 (1958) ("[I]f the Commissioner considered the claim on its merits notwithstanding its form, he waives his regulations as to specificity, is precluded from thereafter denying the refund because the claim was incompatible with his regulations, and must pay any additional amount reflected by his computations."); *see also Weisman v. Commissioner,* 103 F. Supp.2d 621, 628 n.12 (E.D.N.Y. 2000) (holding that perfection is not required if there is a waiver; "by fully investigating the merits of a[] nonconforming claim, the IRS can waive its right to perfection of an informal refund claim, just as it can waive its right to strict compliance with other tax procedure regulations").
24. Chief Counsel Advice Memorandum 200736027 at 4 (January 16, 2007), *available at* http://www.irs.gov/pub/irs-wd/0736027.pdf (last visited June 6, 2011).
25. *See* Attachment to IRS Memorandum from Christopher Wagner (Commissioner, Small Business/Self-Employed Division), Heather Maloy (Commissioner, Large Business & International Division), Sarah Hall Ingram (Commissioner, Tax Exempt and Government Entities Division), and Diane Ryan (Chief, Appeals) regarding "Procedures for Implementing IRC Section 6676 Penalty for Erroneous Claims for Refunds or Credits" at 1 (December 30, 2010) (hereinafter "IRS Interim Guidance Memorandum"), *available at* http://www.irs.treas.gov/pub/foia/ig/sbse/sbse-20-0111-001.doc.pdf (last visited June 6, , 2011).
26. Pub. L. No. 110-28, § 8247, 121 Stat. 112, 204 (2007).
27. Congress passed H.R. 2006 after President George W. Bush vetoed H.R. 1591, an appropriations bill that would have enacted section 6676 in identical form. *See* H.R. 1591, 110th Cong., § 7547 (2007). Congress originally proposed the section 6676 penalty as part of the Telephone Excise Tax Repeal and Taxpayer Protection and Assistance Act of 2006 (S. 1321), which was never enacted. *See* S. 1321, 109th Cong., § 413; S. Rep. No. 109-336 at 65-66 (2006).
28. Staff of the Joint Comm. on Taxation, 110th Cong., *Description of Revenue Provisions Contained in the President's Fiscal Year 2008 Budget Proposal,* JCS-2-07, at 186 (2007) (hereinafter "Joint Committee Report"), *available at* http://www.jct.gov/publications.html?func=startdown&id=1218 (last visited June 6, 2011).
29. *Id.*
30. TIGTA, *Semiannual Report to Congress* at 15-16 (April 1, 2005-September 30, 2005), *available at* http://www.treasury.gov/tigta/semiannual/semiannual_dec2005.pdf (last visited June 6, 2011).
31. Joint Committee Report, *supra* note 28, at 186.
32. *Id.*
33. The Industry Director Directive is available at http://www.irs.gov/businesses/corporations/article/0,,id=202712,00.html (last visited June 6, 2011).
34. *See* Lee A. Sheppard, "IRS Official Previews Coming Penalty Guidance," 125 Tax Notes 51, 52 (October 5, 2009) (reporting that there is a regulation project under section 6676).
35. This CCA, which was released on November 23, 2007, is available at http://www.irs.gov/pub/irs-wd/0747020.pdf (last visited June 6, 2011).
36. *See* Jeremiah Coder, "News Analysis: Behind the Scenes of the Erroneous Refund Penalty," 2010 TNT 153-1 (August 10, 2010) (including the IRS FAQs as an attachment).
37. *See* IRS FAQs, *supra* note 36, at 1.
38. IRM § 20.1.5.14.1(1).
39. *See* CCA 200747020 at 4 ("If the claim for refund or credit with respect to income tax originates with a credit offset for tax such as those listed on page 2 of the Form 1040, U.S. Individual Income Tax Return, then that credit offset is included in the computation of the [excessive amount]."), *available at* http://www.irs.gov/pub/irs-wd/0747020.pdf (last visited June 6, 2011).
40. *Id.* at 3; *see also* IRM § 20.1.5.14.1(4) ("If a $5,000 credit is claimed and only $1,500 is allowable, $3,500 is the excessive amount. The IRC section 6676 penalty = $700 ($3,500 x 20%).").
41. *See* IRM § 20.1.5.14.3(2) ("Additional information on reasonable basis … will be provided in the Federal Tax Regulations."); Sheppard, *supra* note 34, at 52 (reporting that, according to IRS Associate Chief Counsel Deborah Butler, the proposed regulations "will define … what constitutes reasonable basis for an erroneous claim").
42. *See* IRS Office of Chief Counsel PMTA 2010-03 at 3 (February 26, 2010) ("While section 6676 does not define 'reasonable basis' and there are no regulations in effect under that statute, we look to the definition of 'reasonable basis' in regulations promulgated under the section 6662 accuracy-related penalty for guidance."), *available at* http://www.irs.gov/pub/lanoa/pmta_2010-03.pdf (last visited June 6, 2011).
43. Treas. Reg. § 1.6662-3(b)(3). A claim that is "reasonably based on one or more of the authorities set forth in [Treas. Reg.] § 1.6662-4(d)(3)(iii) … will generally satisfy the reasonable basis standard even though it may not satisfy the substantial authority standard." Treas. Reg. 1.6662-3(b)(3). The applicable authorities include the Code, the Treasury Regulations (proposed, temporary, and final), revenue rulings and revenue procedures, tax treaties, court cases, congressional intent,

and informal IRS guidance to the extent that such authorities have not been overruled or modified. On the other hand, those authorities do not include conclusions in treatises, legal periodicals, or opinions rendered by tax professionals. Treas. Reg. § 1.6662-4(d)(3)(iii).

44. CCA 200747020 at 3, *available at* http://www.irs.gov/pub/irs-wd/0747020.pdf (last visited June 6, 2011).
45. IRM § 20.1.5.14.2(2). In addition, the IRS takes the position that it has discretion "to impose the penalty multiple times on multiple claims that lack reasonable basis." *Id*. This position is supported by the language in section 6676(a), which imposes a penalty on a "per claim for refund or credit" basis.
46. In this regard, revenue agents are instructed that the "penalty should not be included on an examination report for the disallowed claim for refund or credit return …, on a[n] Examination 30-day letter, or Statutory Notice of Deficiency relating to the disallowed claim for refund or credit return or the filed income tax return." *See* Attachment to IRS Interim Guidance Memorandum, *supra* note 25, at 3. The guidance in that memorandum will be incorporated into the IRM. *See* IRS Interim Guidance Memorandum, *supra,* at 2.
47. *Id*. at 6.
48. AICPA, *Report on Civil Tax Penalties: The Need for Reform*, 2009 TNT 199-103 at 18 (August 28, 2009).
49. *Id.*
50. *See* IRS Interim Guidance Memorandum, *supra* note 25, at 2 ("The penalty applies to all claims, formal and informal, relating to federal income taxes."); IRS FAQs at 3 ("Q14. Does this penalty apply to formal and informal claims? A14. Yes.")
51. *Angelus Milling Co. v. Commissioner,* 325 U.S. 293, 297 (1945).