

Must Economic Impact Payments to Deceased Individuals Be Returned?

by David M. Fogel

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In this article, Fogel argues that economic impact payments issued to individuals who were alive in 2018 or 2019 but later died are proper under the statute and that Treasury and the IRS lack authority to require their return.

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I. Introduction

On March 27 President Trump signed the [Coronavirus Aid, Relief, and Economic Security \(CARES\) Act](#) (P.L. 116-136). Section 2201 of the CARES Act added section 6428 to the code to provide for a refundable credit to be taken on taxpayers' 2020 returns. It also provides for an advance payment of the credit (an economic impact payment) to be paid to taxpayers as rapidly as possible, no later than December 31.

Under section 6428, an estate or trust is not eligible for the 2020 credit, but the advance payment of the credit is for someone who "was" eligible for it in 2018 or 2019. As a result, an individual who was alive in 2018 or 2019 and later died in 2018 or 2019 is eligible for the advance payment of the credit, even though the individual is not eligible for the 2020 credit.

Once Treasury started issuing advance payments of the credit, and once the media learned that advance payments were being made to individuals who died in 2018 or 2019, this was brought to the attention of Treasury Secretary Steven Mnuchin, who said in an April 29 press conference that payments to these deceased

taxpayers must be returned.¹ The envelopes in which these checks were mailed included a check-box to return the payment if the recipient was deceased.² On May 6 the IRS stated on its website that payments to deceased taxpayers must be returned, and it explained the procedure for returning them.³

Why do these payments need to be returned if they were properly made under the provisions of section 6428 to an individual who was alive in 2018 or 2019 but then died in 2018, 2019, or 2020? The section regarding advance payments is identical to the same section enacted in 2008,⁴ and in 2008 the IRS advised that the advance payments to deceased individuals were permitted.⁵

This article applies section 6428 to the following three taxpayers to determine whether the IRS's advance payment of the credit was proper: (1) a single man who died during 2018, (2) a single woman who died during 2019, and (3) a single woman who died early in 2020 before receiving the payment. My conclusion in all three cases is that the advance payment does not have to be returned.

II. Applicable Law

Section 6428(a) provides for a \$1,200 credit against the 2020 tax for each eligible individual (\$2,400 for eligible individuals filing a joint return), plus \$500 for each qualifying child. The

¹William Cummings, "[You're Not Supposed to Keep That Payment': Mnuchin Wants Stimulus Money Given to Dead Taxpayers Returned](#)," *USA Today*, Apr. 29, 2020.

²The envelope contained the notation, "[] IF RECIPIENT DECEASED Check here and drop in mailbox."

³See IRS, "[Economic Impact Payment Information Center](#)," at Q&A-10 and the last Q&A on the page.

⁴[Economic Stimulus Act of 2008](#), P.L. 110-185, section 101.

⁵See IRS, "[Economic Stimulus Payment Q&As: Eligibility](#)."

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credit is phased out for adjusted gross income above specified limits depending on filing status.⁶ An eligible individual does not include (1) a nonresident alien, (2) a dependent who can be claimed by another taxpayer, or (3) an estate or trust.⁷

Section 6428(f) provides rules for advance payment of the credit. The credit is first determined on the basis of whether the taxpayer was an eligible individual during 2019.⁸ If the taxpayer has not filed a 2019 return, the IRS is authorized to determine the advance credit on the basis of whether the taxpayer was an eligible individual during 2018.⁹ If the taxpayer has not filed either a 2018 or 2019 return, the IRS is authorized to determine the advance credit on the basis of whether the taxpayer received either Form SSA-1099, "Social Security Benefit Statement," or Form RRB-1099, "Social Security Equivalent Benefit Statement," for 2019.¹⁰

Section 6428(f)(1) uses the word "was" in the phrase "who was an eligible individual." This word is significant. This means that (1) someone who *was* an eligible individual during 2019 and filed a 2019 return, (2) someone who *was* an eligible individual during 2018 and filed a 2018 return but not a 2019 return, or (3) someone who *was* an eligible individual during 2019 who did not file a 2018 or 2019 return but who received Form SSA-1099 or Form RRB-1099 for 2019, is entitled to an advance payment of the credit. This language shows that it was Congress's intent to provide advance payments to individuals who were eligible for the credit in 2018 or 2019 but might not be eligible to receive it in 2020.

Section 6428(f)(5) says that the IRS "may" substitute "2018" for "2019" in section 6528(f)(1) if no 2019 return has been filed, and that it "may" use Form SSA-1099 or Form RRB-1099 if no 2018 or 2019 return has been filed. This gives the IRS discretion in how it determines the eligibility of the individual to receive the

advance payment. Some might argue that this permits the IRS to require an advance payment to a deceased taxpayer to be returned after it has been issued. They would be wrong. Once the IRS has used its discretionary authority to determine the eligibility of the individual to receive the advance payment, and after it has issued the payment, the IRS's discretion ends. It may not afterward require that payments to deceased taxpayers be returned.

Section 6428(e) provides for reconciliation of the credit with the advance payment on the 2020 return. This section provides that the credit on the 2020 return will be reduced "but not below zero" by the advance payment of the credit. If the credit on the 2020 return, reduced by the advance payment, is a positive number, the taxpayer may claim that amount as a refundable credit against 2020 income tax liability. If, however, the result is a negative number, the taxpayer's 2020 tax liability is not increased by that negative amount.¹¹ In other words, if the advance payment is more than the 2020 credit, the difference doesn't have to be paid back.

III. Three Situations

Here are the three situations I referred to earlier in which the IRS issued an advance payment of the credit.

A. Situation 1

The taxpayer is a single man who died July 1, 2018. His daughter timely filed his final 2018 return. The AGI shown on his 2018 return was less than \$75,000. On April 27, 2020, the IRS issued the taxpayer a \$1,200 advance payment of the credit.

Under section 6428(d)(3), the taxpayer's estate is not entitled to the credit for the year 2020. Under section 6428(f)(1), the taxpayer was not "an eligible individual for such individual's first taxable year beginning in 2019." But when section 6428(f)(5) is applied, and "2018" is substituted for "2019" in section 6428(f)(1), the taxpayer "was an eligible individual for such

⁶Section 6428(c).

⁷Section 6428(d).

⁸Section 6428(f)(1).

⁹Section 6428(f)(5)(A).

¹⁰Section 6428(f)(5)(B).

¹¹Joint Committee on Taxation, "[Description of the Tax Provisions of Public Law 116-136, The Coronavirus Aid, Relief, And Economic Security \("CARES"\) Act](#)," JCX-12R-20, at 11 (Apr. 23, 2020).

individual's first taxable year beginning in 2018" because he was alive during the first half of 2018. As a result, the IRS's issuance of a \$1,200 advance credit payment was proper.

For 2020, the taxpayer is not entitled to any credit because he was deceased in 2018. Under section 6428(e)(1), the taxpayer's credit for 2020 would be zero, and it would be reduced by the \$1,200 advance payment, resulting in a negative number. As a result, none of the \$1,200 advance credit payment must be paid back.

B. Situation 2

The taxpayer is a single woman who died July 1, 2019. Her son timely filed her final 2019 return. The AGI shown on her 2019 return was less than \$75,000. On April 20, 2020, the IRS issued the taxpayer a \$1,200 advance payment of the credit.

Under section 6428(d)(3), the taxpayer's estate is not entitled to the credit for the year 2020. Under section 6428(f)(1), the taxpayer was "an eligible individual for such individual's first taxable year beginning in 2019" because she was alive during the first half of 2019. As a result, the IRS's issuance of a \$1,200 advance credit payment was proper.

For 2020, the taxpayer is not entitled to any credit because she was deceased in 2019. Under section 6428(e)(1), the taxpayer's credit for 2020 would be zero, and it would be reduced by the \$1,200 advance payment, resulting in a negative number. As a result, none of the \$1,200 advance credit payment must be paid back.

C. Situation 3

The taxpayer is a single woman who died January 15, 2020. For 2018 and 2019, she did not file an income tax return because her only income was Social Security benefits, which were not taxable because they fell below the threshold for filing a return. For the year 2019, the taxpayer received Form SSA-1099 reporting her Social Security benefits. On May 4, 2020, the IRS issued the taxpayer a \$1,200 advance payment of the credit.

Under section 6428(f)(1), the taxpayer was "an eligible individual for such individual's first

taxable year beginning in 2019." As a result, the IRS's issuance of a \$1,200 advance credit payment was proper.

The taxpayer is entitled to a \$1,200 credit on her final return for 2020 because she was an eligible individual for her entire short tax year January 1 to January 15, 2020. Under section 6428(e)(1), the taxpayer's credit for 2020 would be \$1,200, and it would be reduced by the \$1,200 advance payment, resulting in zero. As a result, none of the \$1,200 advance credit payment must be paid back.

IV. Conclusion

If an individual, otherwise qualified to receive an advance payment of the credit, became deceased at some time during 2018, 2019 or 2020, and if the IRS issued an advance payment of the credit to that individual, the payment need not be returned because it was properly issued in accordance with section 6428.¹²

Taxpayers may be concerned about keeping these payments when the Treasury secretary and the IRS have instructed that payments to deceased individuals be returned. However, what the Treasury secretary states at a press conference is not law, and unofficial guidance from the IRS in the form of a question and answer posted on its website is not legal authority.¹³

Unless and until Congress passes legislation requiring that advance payments issued to deceased individuals be returned, they need not be. However, such legislation is unlikely given the questionable constitutionality of retroactive legislation increasing a taxpayer's tax liability.¹⁴ ■

¹²Former National Taxpayer Advocate Nina Olson agrees. See Olson, "[The Uncertainty of Death and Taxes: Economic Stimulus Payments to Deceased Individuals](#)," *Procedurally Taxing*, May 11, 2020.

¹³See Monte A. Jackel, "[The Proper Role of FAQs](#)," *Procedurally Taxing*, May 8, 2020.

¹⁴Erika K. Lunder, Robert Meltz, and Kenneth R. Thomas, "[Constitutionality of Retroactive Tax Legislation](#)," Congressional Research Service, R42791 (Oct. 25, 2012).