Current Federal Tax Developments

Week of April 19, 2021

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SECTION: 71
JUDGE'S COVER LETTER ACCOMPANYING ORDER IN DIVORCE FOUND TO PROVIDE PAYMENTS WOULD NOT BE TAXABLE TO RECIPIENT

Citation: Ragan v. Commissioner, Case No. No. 16251-17S, 3/11/21

In a bench opinion issued in the case of *Ragan v. Commissioner*, Case No. 16251-17S[1] the Tax Court looked at an issue still relevant for pre-2019 divorces—whether amounts paid to Leah Ragan had to be included in her income as alimony.

The divorce in this case was finalized long before the Tax Cuts and Jobs Act (TCJA) eliminated both the deduction for alimony paid and taxation of alimony received. The divorce took place in 2003. The dispute arises over payments that Ms. Ragan is receiving from her former spouse. As the Court summarized the issue:

> Ms. Ragan was divorced in 2003 and has been receiving payments from her ex-husband since then. Through a series of documents including a decision, two amended judgments, and a letter explaining the last amended judgment, the judge presiding over the divorce ordered that the payments made to Ms. Ragan be net of taxes until such time as the divorcing parties resolved how much the payments should be increased to take into account the tax liability that would be imposed on those payments. They never reached agreement. Ms. Ragan did not include the payments in her 2014 income. The Commissioner determined that the payments Ms. Ragan received were taxable. She disagrees.[2]

For divorce agreements governed by pre-TCJA provisions, the federal definition of alimony controls the tax treatment. Note that this definition does not depend on what label the state might apply to the payments in question[3]. The opinion summarizes the rule as follows:

> There are four elements that must be met for payments to fit the definition of alimony or separate maintenance payments as defined in section 71(b)(1). The payments must be received by a spouse under a divorce or separation instrument; that instrument must not designate the payment as not includible in gross income and not allowable as a deduction under section 215; the payee spouse and the payor spouse

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[1] *Ragan v. Commissioner*, Case No. No. 16251-17S, March 11, 2021, https://www.taxnotes.com/research/federal/court-documents/court-opinions-and-orders/payments-from-ex-husband-not-includable-in-income-as-alimony/4v97y?h=Ragan (retrieved April 15, 2021)

[2] *Ragan v. Commissioner*, Case No. No. 16251-17S, March 11, 2021

[3] *Ragan v. Commissioner*, Case No. No. 16251-17S, March 11, 2021

> must not be members of the same household; and the liability to make the payments must terminate after the death of the payee spouse.[4]

In this case, the question was whether Ms. Ragan had a divorce instrument that designates the payment as not includable in her gross income. The IRS and the taxpayer agreed that the other tests would have the payments treated as taxable alimony to Ms. Ragan.

The payments in question proved to be more of a problem to finally resolve between the former spouses than had been expected. The opinion describes the payments as follows:

> On May 22, 2003, Judge Herr finalized the Ragans' divorce. In her decision, Judge Herr awarded Ms. Ragan monthly alimony of $6,279. That decision was rendered orally and appears in a transcript that was served on the previously married parties. Before embarking on a discussion of how much the alimony should be, Judge Herr noted, in the future tense, that alimony "would, of course, be taxable" to Ms. Ragan. However, after discussing the factors leading to her determination of the amount of alimony, Judge Herr ordered that Mr. Ragan pay alimony "net of any taxes." She then left it to the parties to "provide the Court with the tax reserve needed . . . so that [Ms. Ragan's] gross alimony can be calculated accordingly." Judge Herr required the parties to agree on the deductions that each party would take, determine the gross payments needed to reach the net alimony amount she had awarded, and report the tax reserve needed to calculate the gross alimony. But the parties could not reach an agreement, which led Judge Herr to issue several orders amending her original judgment.[5]

The parties clearly intended for the final payments to be treated as taxable alimony by Ms. Ragan, but until a final number was resolved the payments were "net of tax." But that agreement upon a final number proved elusive, resulting in the Judge amending the agreement first in June, then made the final adjustment in September. This last set of documents is what the Court is scrutinizing to see if they designate the payments as not taxable to Ms. Ragan:

> On September 26, 2003, Judge Herr further amended her judgment through an order issued to enforce Ms. Ragan's rights under the previous decision as amended. In that order, Judge Herr ordered Mr. Ragan to pay the delinquent amount of unallocated alimony, split the total monthly amount of $6,279 into two installments, and changed the enforcement procedures such that two missed payments would result in the issuance of a bench warrant for Mr. Ragan. Notably, Judge Herr, in her own handwritten alteration to the order, referred to the payment to be made to Ms. Ragan as "monthly unallocated support" as distinguished from her prior references to alimony.

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[4] *Ragan v. Commissioner*, Case No. No. 16251-17S, March 11, 2021

[5] *Ragan v. Commissioner*, Case No. No. 16251-17S, March 11, 2021

> Judge Herr further clarified her intent with respect to her September 26, 2003 order by transmitting it with a cover letter that explicitly reference "the enclosed order." In that letter, Judge Herr explained how the modifications she made in her order affected the decision she had previously rendered. Concerning the tax consequences, she noted that she "anticipated that counsel would be able to calculate the income taxes [Ms. Ragan] would pay on this unallocated support and her imputed income and be able to supply that 'taxable' alimony figure." She then explained that "[s]ince you have not calculated the amount [Ms. Ragan] needs to receive as alimony to net $6,279 per month * * * I am simply advising Probation to continue to collect the unallocated non-taxable support for [Ms. Ragan] of $6,279."[6]

While Ms. Ragan continued to try and get her ex-spouse to agree to an amount for the gross alimony, the parties never agreed to that amount.

The IRS argued that this situation was similar to the one found in the 1999 case of *Jaffe v. Commissioner*, TC Memo 1999-196:

> The mere obligation of the payor to bear the ultimate tax cost is not sufficient to classify a payment as being other than alimony or separate maintenance. In *Jaffe v. Commissioner*, T.C. Memo., 1999-196, 77 T.C.M. 2167 (1999), the divorce instrument stated that the payor "shall be responsible for income taxes due." We held that this language was not sufficient to constitute a designation as nontaxable to the payee under section 71(b)(1)(B). That language merely required the payor be responsible for the taxes (which could, for example, be accomplished through a gross-up) and did not address the payee's excluding the payment from income.[7]

But the Court found that Ms. Ragan's case was different enough from that in *Jaffe* to change the result:

> Here, Judge Herr intended for the $6,279 support payments to be net of taxes to Ms. Ragan and excluded from her income. She initially intended to accomplish this by requiring the parties to calculate the amount of a tax reserve, which would have enabled the court to establish a gross alimony amount. When the parties failed to reach agreement as to that tax reserve, Judge Herr altered her initial decision in a September 26, 2003, order. In that order, she specified that the support payments would remain at the net amount. In the cover letter accompanying that order, she explained that because the parties could not agree on the tax issues, the support payments were to be treated as nontaxable. Judge Herr even changed her terminology, referring to the monthly payments as "support" in both the September 26, 2003 order and the transmittal letter.

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[6] *Ragan v. Commissioner*, Case No. No. 16251-17S, March 11, 2021

[7] *Ragan v. Commissioner*, Case No. No. 16251-17S, March 11, 2021

> The language in Ms. Ragan's divorce instrument substantively differs from the contested instrument at issue in Jaffe. The language in the Jaffe instrument delegated the ultimate burden of paying the taxes, using language similar to that found in an indemnification clause. In contrast, Judge Herr designated the tax treatment of the support payments, explicitly referring to them as nontaxable.[8]

The IRS argued that only the Judge's September 23, 2003 order should be consulted to determine the tax status, ignoring the cover letter. But the Tax Court didn't accept that view:

> The Commissioner posits that we should look no further than the judgement of divorce and the amended judgments of divorce. To do so would require that we disregard the clause "written instrument incident to such a decree." That clause requires that we take into account any instrument that supplements a decree. And the term "instrument" is broader than how the Commissioner would have us define it. Black's Law Dictionary defines a written instrument as "[a] written legal document that defines rights, duties, entitlements, or liabilities." It goes on to cite Edward Beal's *Cardinal Rules of Legal Interpretation*, for the proposition that "[a]n 'instrument' seems to embrace * * * any written or printed document that may have to be interpreted by the Courts." We are confident that Judge Herr would consider her letter transmitting and explaining her order as a written legal document that defines rights and liabilities. So do we. A letter transmitting an accompanying order written by the same judge who wrote the order that explains the rights and obligations of the parties who are subject to that order fits neatly within the definition of a written instrument incident to a decree.[9]

Thus, the bench order concludes:

> The payments received by Ms. Ragan were classified by the judge in the written instruments incident to the divorce decree as nontaxable. Thus, the payments fall outside of the section 71(b)(1) definition of alimony and are not subject to inclusion in Ms. Ragan's gross income.[10]

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[8] *Ragan v. Commissioner*, Case No. No. 16251-17S, March 11, 2021

[9] *Ragan v. Commissioner*, Case No. No. 16251-17S, March 11, 2021

[10] *Ragan v. Commissioner*, Case No. No. 16251-17S, March 11, 2021

SECTION: 213
MOST COSTS INCURRED BY MALE COUPLE SEEKING TO HAVE A CHILD WERE NOT DEDUCTIBLE MEDICAL EXPENSES

Citation: PLR 202114001, 4/9/21

In PLR202114001[11] the IRS ruled that most of the costs incurred by a male couple wishing to have a child were not deductible medical expenses.

The question involves IRC §213 which allows a deduction for medical care of the taxpayer and dependents of the taxpayer. Specifically, the ruling looks at the definition of such care found at IRC §213(d)(1)(A) which reads:

> (d) Definitions
>
> For purposes of this section—
>
> (1) The term "medical care" means amounts paid—
>
> (A) for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body,…

The taxpayers were seeking a ruling allowing a deduction for costs incurred related to the following items:

- Medical expenses directly attributed to both spouses
- Egg retrieval
- Medical expenses of sperm donation
- Sperm freezing
- IVF medical costs
- Childbirth expenses for the surrogate
- Surrogate medical insurance related to the pregnancy
- Legal and agency fees for the surrogacy

[11] PLR 202114001, April 9, 2021, https://www.taxnotes.com/research/federal/irs-private-rulings/letter-rulings-%26-technical-advice/same-sex-couple-can%e2%80%99t-deduct-most-costs-of-having-a-child/4m2b5 (retrieved April 15, 2021)

- Any other medical expenses arising from the surrogacy.[12]

The ruling begins by noting that "vasectomies and operations that render a woman incapable of having children affect a structure or function of the body" and thus are medical expenses under the definition found at IRC §213(d)(1)(A).[13] However, note that it is the impact on the body of the taxpayer, not the ultimate impact on having a child that renders this as a medical cost.

As the PLR notes:

> The medical expense deduction has historically been construed narrowly. See *Atkinson v. Commissioner*, 44 T.C. 39 (1965); See also *Magdalin v. Commissioner*, T.C. Memo 2008-293, *aff'd* without published opinion, 105 A.F.T.R.2d (RIA) 2010–442 (1st Cir. 2009). Deductions for medical care have been confined strictly to expenses incurred primarily for the prevention or alleviation of a physical or mental defect or illness. See Treas. Reg. § 1.213-1(e)(1)(ii). Generally, for an expense to be deductible, there must be a causal relationship between a medical condition and the expenditures incurred in treating the condition. See *Jacobs v. Commissioner*, 62 T.C. 813 (1974); *Havey v. Commissioner*, 12 T.C. 409 (1949). The current facts do not identify a medical condition nor do taxpayers allege that expenses are incurred to treat a medical condition. Rather the request relies on the second portion of I.R.C § 213(d)(1)(A) in claiming IVF, surrogacy, and related costs are for the purpose of affecting any structure or function of the body.[14]

The PLR looks first to the 2008 Tax Court decision in *Magdalin v. Commissioner*, TC Memo 2008-293:

> The Tax Court considered surrogacy and egg donor expenses claimed by a single, heterosexual male, and held costs incurred in fathering children through unrelated egg donors and gestational carriers are not deductible medical expenses under I.R.C. § 213. See *Magdalin v. Commissioner*, T.C. Memo 2008-293, aff'd without published opinion, 105 A.F.T.R.2d (RIA) 2010–442 (1st Cir.2009). The taxpayer in *Magdalin* obtained donated eggs to be fertilized with his sperm and transferred to a gestational carrier using the IVF process. He deducted legal fees related to the donor and surrogacy agreements, fees and expenses of the donor and surrogate, fees to the IVF clinic, and prescription costs. The Tax Court disallowed these costs as medical expense deductions holding there was no causal relationship between an underlying medical condition or defect and the taxpayer's expenses, nor were the costs incurred for the purpose of affecting a structure or function of taxpayer's body. *Id.*[15]

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[12] PLR 202114001, April 9, 2021

[13] Rev. Rul. 73-201 and Rev. Rul. 73-603

[14] PLR 202114001, April 9, 2021

[15] PLR 202114001, April 9, 2021

The key issue is that while these various costs are incurred to affect a human body, it's not the body of a party for whom these taxpayers are allowed to deduct medical expenses. The ruling points this out as follows:

> Only costs and fees directly attributable to medical care for diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body of the taxpayer, the taxpayer's spouse, or taxpayer's dependent qualify as eligible medical expenses. Expenses involving egg donation, IVF procedures, and gestational surrogacy incurred for third parties are not incurred for treatment of disease nor are they for the purpose of affecting any structure or function of taxpayers' bodies. As such, payments related to the following products and services are not deductible under I.R.C. § 213: egg retrieval, IVF medical costs, childbirth costs and fees for the surrogate, surrogate medical insurance related to the pregnancy, legal and agency fees for the surrogacy, and other medical costs and fees arising from the surrogacy.[16]

However, the ruling did find some expenses would qualify because they directly affected the taxpayers in question:

> In contrast, however, there are a comparatively smaller number of medical costs or fees paid for medical care directly attributable to taxpayers, examples in this case being sperm donation and sperm freezing, that are deductible medical expenses under I.R.C. § 213, subject to the adjusted gross income limitation of the section.[17]

SECTION: 6081
FORM 4868 FILED AFTER APRIL 15 AND ON OR BEFORE MAY 17, 2021 WILL NOT EXTEND THE TIME TO FILE A GIFT TAX RETURN

Citation: "What's New - Estate and Gift Tax," IRS website, 4/12/21

A question that many professionals had after the IRS announced the formal extension of time to file calendar year Forms 1040 in Notice 2021-21 was the impact of that extension on using a Form 4868 to extend both the income tax and gift tax return for 2020. In an update to the What's New page for estate and gift taxes on the IRS website, the IRS provided information on this issue.[18]

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[16] PLR 202114001, April 9, 2021

[17] PLR 202114001, April 9, 2021

[18] "What's New - Estate and Gift Tax," IRS website, April 12, 2021, https://www.irs.gov/businesses/small-businesses-self-employed/whats-new-estate-and-gift-tax (retrieved April 14, 2021)

The IRS states that a six-month extension of time to file the Form 709 otherwise due on April 15, 2021 can be obtained by:

- Filing Form 4868, *Application for Automatic Extension of Time To File U.S. Individual Income Tax Return* (or, in limited cases, Form 2350, *Application for Extension of Time to File U.S. Income Tax Return*) on or before April 15, 2021 which will extend the due date for both the income tax and gift tax return; or

- Filing Form 8892, *Application for Automatic Extension of Time to File Form 709 and/or Payment of Gift/Generation-Skipping Transfer Tax* on or before April 15, 2021.[19]

However, if a taxpayer files the Form 4868 after April 15, 2021 but on or before May 17, 2021 it will *only* serve to extend the time to file the income tax return. There would be no extension of time granted to file the gift tax return.

The page reads as follows in discussing the two methods available to obtain an extension of time to file Form 709:

> **Method 1: Extending the time to file your income tax return.** Generally, a request for an extension of time for filing your calendar year federal income tax return will also extend the time to file your federal gift tax return. Use Form 4868, *Application for Automatic Extension of Time To File U.S. Individual Income Tax Return*, and in certain limited circumstances, Form 2350, *Application for Extension of Time To File U.S. Income Tax Return*, and file on or before April 15, 2021, to extend the time for filing both the 2020 federal income tax return and 2020 federal gift tax return.
>
> - You may use these forms to extend the time for filing your gift tax return only if you are also requesting an extension of time to file your income tax return.
>
> - Filing Form 4868 or Form 2350 after April 15, 2021 and on or before May 17, 2021, will not extend the due date for filing your 2020 federal gift tax return – it only will extend the due date for filing your 2020 income tax return. See Notice 2021-21, Relief for Form 1040 Filers Affected by Ongoing Coronavirus Disease 2019 Pandemic.
>
> - Note: You may file Form 4868 or Form 2350 after April 15, 2021 and on or before May 17, 2021 to extend the time for filing your 2020 federal income tax return regardless of whether you previously filed Form 8892, and regardless of how you checked the box in Part II of Form 8892 regarding an extension of time to file your individual income tax return.
>
> **Method 2: Filing Form 8892.** If you do not request an extension of time for filing your income tax return, use Form 8892, *Application for Automatic Extension of Time To File Form 709 and/or Payment of*

[19] "What's New - Estate and Gift Tax," IRS website, April 12, 2021

Gift/Generation-Skipping Transfer Tax, and file on or before April 15, 2021, to request an automatic 6-month extension of time to file your 2020 federal gift tax return. Form 8892 also serves as a payment voucher (Form 8892-V) for a balance due on federal gift taxes for which you are extending the time to file. For more information, see Form 8892.[20]

SECTION: 6654
IRS FINALLY STATES HOW THE AGENCY WILL APPLY OVERPAYMENTS ON 2020 RETURNS TO 2021 ESTIMATED TAXES

Citation: "Electing To Apply a 2020 Return Overpayment From a May 17 Payment with Extension Request to 2021 Estimated Taxes," IRS website, 4/12/21

The IRS has now clarified how it will handle overpayments on 2020 individual tax returns applied to 2021 income taxes in a post on the IRS website.[21] We had covered pre-existing guidance in a prior article released on April 6, 2021.[22]

As we discussed in that article, the IRS was entering a bit of uncharted territory since we hadn't before faced a due date that had been moved back from the original due date by the agency itself, while leaving the next year's estimate date untouched. Luckily, the IRS did not take the most heavy-handed approach possible, though they took quite a bit of time deciding to clarify the issue.

Basically, the IRS is going to look at amounts paid through April 15, 2021 and compare that to the tax shown on the return.

- To the extent the payments that were made through that date create an overpayment, if that overpayment is applied to 2021's tax it will be treated as paid on April 15, 2021 (that is, applied to the first estimate).

- To the extent amounts are paid after that date, any overpayment created by those amounts will be applied to 2021's tax as of the date the amount was actually paid for purposes of computing an underpayment of estimated tax penalty for 2021.

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[20] "What's New - Estate and Gift Tax," IRS website, April 12, 2021

[21] "Electing To Apply a 2020 Return Overpayment From a May 17 Payment with Extension Request to 2021 Estimated Taxes," IRS website, April 12, 2021, https://www.irs.gov/forms-pubs/electing-to-apply-a-2020-return-overpayment-from-a-may-17-payment-with-extension-request-to-2021-estimated-taxes (retrieved April 13, 2021)

[22] Ed Zollars, CPA, "Can a Taxpayer Apply an Extension Payment in 2021 That Results in an Overpayment to the First Quarter Estimated Tax Payment for 2021?," Current Federal Tax Developments website, April 6, 2021, https://www.currentfederaltaxdevelopments.com/blog/2021/4/6/can-a-taxpayer-apply-an-extension-payment-in-2021-that-results-in-an-overpayment-to-the-first-quarter-estimated-tax-payment-for-2021

The formal statement reads:

> The IRS postponed to May 17, 2021, the date to file 2020 Forms 1040 and 1040-SR and to pay any related tax. The due dates for estimated tax payments for 2021 were not postponed. The first 2021 estimated tax installment is due April 15, 2021. If an individual taxpayer has a 2020 overpayment and elects to credit the 2020 overpayment against the 2021 estimated tax, the date on which the 2020 overpayment is applied against the 2021 estimated tax depends on: (a) the date(s) of payment, and (b) the extent to which an overpayment exists as of April 15, 2021. An extension of time to file has no effect on either the date of payment or the date on which an overpayment exists.
>
> To the extent an overpayment of the 2020 tax exists as of April 15, 2021 (because payments made on or before April 15, 2021, exceed the 2020 tax liability), and the taxpayer makes a valid election to apply the overpayment to 2021 estimated tax, the overpayment would be applied as of April 15, 2021, whether the 2020 return is filed on April 15, May 17, or October 15, 2021.
>
> To the extent an overpayment of the 2020 tax is attributable to a payment made after April 15, 2021 (including any payment made after April 15, 2021, but on or before May 17, 2021), that overpayment would **not** be available for crediting as of April 15, 2021, and would be applied as of the payment received date, **not** as of April 15, 2021.[23]

The IRS provides three examples of applying this standard:

EXAMPLE 1

Assume that an individual taxpayer: (a) owes $40,000 in income tax for 2020; (b) made no payments toward that tax by April 15, 2021; (c) owes $10,000 for the first estimated tax installment for 2021 due on April 15, 2021; and (d) paid $50,000 toward the 2020 tax on May 17, 2021. As a result, the taxpayer has a $10,000 overpayment for 2020. Because the payment was not made by April 15, 2021, no overpayment existed as of April 15, 2021, and the overpayment would not be available for crediting on April 15, 2021. Instead, the overpayment would be credited against the 2021 estimated tax installment as of May 17, 2021, the date of payment. The taxpayer's $50,000 payment on May 17, 2021, caused the taxpayer's payments to exceed the taxpayer's liabilities. Therefore, the taxpayer became overpaid on May 17, 2021, and May 17, 2021 is the date the $10,000 overpayment is available for crediting, even if the $50,000 payment made on May 17, 2021, was paid with an application to automatically extend the due date to file the 2020 return to October 15, 2021. An extension of time to file has no effect on either the date of payment or the date on which an overpayment exists.

EXAMPLE 2

Assume that an individual taxpayer: (a) owes $40,000 in income tax for 2020; (b) prepaid $40,000 of that 2020 tax during 2020; (c) owes $10,000 for the first estimated tax installment for 2021 due on April 15, 2021; and (d) paid $10,000 toward the 2020 tax on May 17, 2021. As a

[23] "Electing To Apply a 2020 Return Overpayment From a May 17 Payment with Extension Request to 2021 Estimated Taxes," IRS website, April 12, 2021

result, the taxpayer has a $10,000 overpayment for 2020. Because the taxpayer's payments as of April 15, 2021, did not exceed the taxpayer's liability, no overpayment exists as of April 15, 2021, and the overpayment is not available for crediting on April 15, 2021. The taxpayer's $10,000 payment on May 17, 2021, caused the taxpayer's payments to exceed the taxpayer's liabilities. Therefore, the taxpayer became overpaid on May 17, 2021, and May 17, 2021 is the date the $10,000 overpayment is available for crediting, even if the $10,000 payment made on May 17, 2021, was paid in conjunction with an application to automatically extend the due date to file the 2020 return to October 15, 2021. An extension of time to file has no effect on either the date of payment or the date on which an overpayment exists.

EXAMPLE 3

Assume that an individual taxpayer: (a) owes $40,000 in income tax for 2020; (b) prepaid $45,000 of that 2020 tax during 2020; (c) owes $10,000 for the first estimated tax installment for 2021 due on April 15, 2021; and (d) paid $5,000 toward the 2020 tax on May 17, 2021. As a result, the taxpayer has a $10,000 overpayment for 2020. Because the taxpayer's payments as of April 15, 2021, exceeded the taxpayer's liability by $5,000, an overpayment of $5,000 existed on April 15, 2021, and that overpayment is applied against the first 2021 estimated tax installment as of April 15, 2021. The remaining $5,000 of the $10,000 overpayment is attributable to the payment made on May 17, 2021, which is when this amount would be credited against the first 2021 estimated tax installment, even if the $5,000 payment made on May 17, 2021, was paid with an application to automatically extend the due date to file the 2020 return to October 15, 2021. An extension of time to file has no effect on either the date of payment or the date on which an overpayment exists.[24]

[24] "Electing To Apply a 2020 Return Overpayment From a May 17 Payment with Extension Request to 2021 Estimated Taxes," IRS website, April 12, 2021