



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OFFICE OF
CHIEF COUNSEL

March 15, 1999

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INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

MEMORANDUM FOR

FROM: DEBORAH A. BUTLER
ASSISTANT CHIEF COUNSEL (FIELD SERVICE)
CC:DOM:FS

SUBJECT:

This Field Service Advice responds to your memorandum dated August 21, 1998. Field Service Advice is not binding on Examination or Appeals and is not a final case determination. This document is not to be cited as precedent.

LEGEND:

Petitioner
Former Spouse

YR1
YR2
YR3
YR4
YR5
YR6
YR7
YR8
YR9
YR10
YR11
YR12
YR13

First Address
Second Address
Third Address
Fourth Address

Office 1
Office 2
Office 3
Office 4
Office 5
Office 6

Service Center 1
Service Center 2

\$
\$

\$X
\$Y

Revenue Officer 1
Revenue Officer 2
Revenue Officer 3
Revenue Officer 4

Employee 1

Exam Manager

ISSUE(S):

Whether the hazards of litigation are such that it would be appropriate to abate, pursuant to I.R.C. § 6404(e)(1), a portion of the interest that accrued on petitioner's deficiency.

CONCLUSION(S):



FACTS:

Petitioner was married to Former Spouse. In February YR2, they were divorced. Petitioner filed a joint income tax return with Former Spouse for Tax YR1. The address listed on the return was First Address.

The Tax YR1 joint income tax return was selected for examination on November 6, YR2. In October YR3, an examination of the Tax YR1 tax return was conducted by the Internal Revenue Service's office in Office 1. The items on the return under examination included Schedule C business expenses related to Former Spouse's brokerage business and Schedule A interest.

Former Spouse and Former Spouse's representative met with the examiner and provided information regarding the adjustments. A new address, Second Address, was provided to the examiner. Apparently, Petitioner did not participate in the examination. Petitioner did sign a Form 872 reflecting the Second Address. Petitioner was aware of the examination of the Tax YR1 return, but alleges that Former Spouse was to take care of it since the items under examination were related to Former Spouse's business.

On March 31, YR5, Petitioner signed a Form 870 agreeing to the assessment of a tax deficiency for the Tax YR1 in the amount of \$X. Petitioner allegedly signed the Form 870 at the insistence of Former Spouse's accountant. Former Spouse also signed a Form 870 agreeing to the deficiency. In a letter dated this same date, Petitioner notified the examiner that Petitioner's current address was Third Address, and requested that all future correspondence to Petitioner be sent to this address since Petitioner was no longer married to Former Spouse.

On April 24, YR5, separate non-master file assessments were made against Petitioner and Former Spouse for the Tax YR1 deficiency, including penalties.

Petitioner sent a letter dated May 1, YR5 to the Internal Revenue Service. Petitioner claims that the letter asked for innocent spouse relief as to the Tax YR1 deficiency. On May 15, YR5, Taxpayer Service in Office 2 sent a letter to Petitioner stating that they had received Petitioner's correspondence dated May 1, YR5, and would provide Petitioner with a response in 30 days.

On June 5, YR5, Service Center 1 sent a notice to Petitioner requesting payment of the Tax YR1 tax deficiency. The notice also stated that the Internal Revenue Service had previously written to Petitioner requesting payment of the tax owed. Another payment notice was sent to Petitioner on July 17, YR5.

Petitioner sent Service Center 1 a letter dated August 10, YR5, stating that the payment notice dated July 17, YR5 had been sent to 132 Fourth address instead of 123 Fourth Address. The letter also contained a request for innocent spouse relief. Petitioner explained that the adjustments giving rise to the Tax YR1 deficiency related to Former Spouse's business and that because they were separated in YR1 Petitioner had no knowledge or control over Former Spouse's activities. Petitioner stated that Petitioner had not been involved in the examination and had signed the Form 870 at the insistence of Former Spouse and Former Spouse's representative.

On August 28, YR5, another payment notice was sent to Petitioner.

On September 5, YR5, Petitioner sent Service Center 1 a letter in response to the August 28th payment notice. In the letter, Petitioner stated that Petitioner had not received a reply to the August 10th letter requesting innocent spouse relief from the tax deficiency. Petitioner again provided a current address and telephone number.

The Correspondence Section of Service Center 1 sent a letter to Petitioner dated September 15, YR5, stating that the letter had been forwarded to the Collection Division and that Petitioner would be contacted by them.

On December 5, YR5, the Collection Division in Service Center 2 sent a letter to Petitioner thanking Petitioner for the correspondence dated August 10, YR5, and informing Petitioner that they would provide a response within 30 days.

Petitioner received another letter from the Correspondence Section of Service Center 1 dated December 12, YR5, acknowledging the receipt of the August 10th letter and stating that it had been forwarded to Service Center 2.

On December 21, YR5, the Collection Division in Service Center 2 sent another letter to Petitioner. This letter stated that they were following-up on the August 10th letter, but they had not had time to gather information and would contact Petitioner again within 30 days.

Petitioner sent the Collection Division a letter dated January 2, YR6. On January 10, YR6, the Collection Division replied to Petitioner. The letter thanked Petitioner for the inquiry dated January 2, YR6, but stated that it had been forwarded to the Claims Division of Service Center 2. The letter explained that Petitioner's inquiry could best be processed by the Claims Division.

The Collection Division sent a letter to Petitioner dated January 26, YR6 again thanking Petitioner for the August 10th letter. The Collection Division stated that in order to consider the request for adjustment, Petitioner needed to provide them with information explaining the reason for the "delay." Petitioner had not sought relief based on a delay. When Petitioner received the January 26, YR6 letter, Petitioner allegedly called the Collection Division, explained that Petitioner was awaiting a decision on an innocent spouse claim, and provided Former Spouse's name and telephone number. According to Petitioner, Former Spouse had stated that Former Spouse was taking care of the tax deficiency. In the event that a taxpayer claims to be an innocent spouse, IRM 57(10)(13).(13) requires Collection personnel to refer the question to the district Examination function for determination.

On December 17, YR6, a Final Notice/Notice of Intent to Levy was sent to Petitioner by Revenue Officer 1, who was located in Office 3. Although the final

notice was sent to Petitioner's old address, Second Address, Petitioner received the final notice. Petitioner then called Revenue Officer 1 and explained that Petitioner was awaiting a decision on the innocent spouse claim. Revenue Officer 1 allegedly told Petitioner not to pay the tax due until a decision was made on the innocent spouse claim.

Revenue Officer 1 has since retired from the Service. He does not recall any of his statements or actions regarding Petitioner's case. An attempt was made to obtain Revenue Officer 1's collection file, which presumably would contain his notes or contact history. Unfortunately, due to the age of the case, the file had been destroyed. Revenue Officer 1 has stated that when a taxpayer requests innocent spouse relief and the Revenue Officer believes the claim may be valid, the Revenue Officer sends a request to the Examination Division for consideration of the claim. It is also the procedure to suspend collection of the tax while the request is under consideration.

Revenue Officer 1 stated that at the time he had Petitioner's case, he was recovering from a stroke and heart surgery. Revenue Officer 1 indicated that the stroke had caused some memory loss and he was taking medication. He said that he had returned to work too soon which resulted in complications and this could explain why he may not have followed up on Petitioner's request for innocent spouse relief. Because the file is missing, the Service is unable to determine whether Revenue Officer 1 ever sent a request consideration to the Examination Division.

On November 24, YR8, a Final Notice/Notice of Intent to Levy was issued to Petitioner by Revenue Officer 2, in Office 5. When the notice was received, Petitioner allegedly called Revenue Officer 2 and explained that Petitioner was still awaiting a decision on the innocent spouse claim and that Former Spouse was taking care of the tax deficiency. Petitioner claims that Revenue Officer 2 said to file an innocent spouse claim and that collection would be suspended until a decision was reached on Petitioner's claim. Revenue Officer 2 cannot remember her statements or contacts with Petitioner. Revenue Officer 2 stated that if she had received an innocent spouse request she would have forwarded it to Examination for consideration as required by Internal Revenue Service procedure. Revenue Officer 2's collection file containing her notes and contact history, have been destroyed.

By July YR10, Petitioner had moved to another state. As a result, Petitioner's collection case was assigned to Revenue Officer 3 in Office 6. Revenue Officer 3 was able to determine from information in Revenue Officer 2's file that Petitioner had filed an innocent spouse claim and it had not been worked because the YR1 account had been transferred around so much.

When Revenue Officer 3 contacted Petitioner regarding payment of the YR1 tax deficiency on October 27, YR10, Petitioner stated that Petitioner thought this matter had been resolved and did not realize there still was a problem. Revenue Officer 3 requested that Petitioner send her proof of Petitioner's innocent spouse claim.

In response to Revenue Officer 3's request, on November 12, YR10 Petitioner sent a letter requesting innocent spouse relief. In the letter, Petitioner explained the separation and divorce from Former Spouse and stated that the adjustments resulting in the YR1 deficiency were related to Former Spouse's business activities. Petitioner also explained that the innocent spouse request had been discussed with Revenue Officer 1 in Office 3, in December YR6 and Revenue Officer 4 in Office 5 in March YR7. Counsel attempted to locate Revenue Officer 4 but the individual contacted in Office 5 had not heard of Revenue Officer 4 and Revenue Officer 4 was not listed in the employee directory or in directory assistance.

A week later, on November 17, YR10, Petitioner sent Revenue Officer 3 a letter containing the collection notice received in November YR8. In the letter, Petitioner stated that the case had been previously discussed with Revenue Officer 2 and that Petitioner thought that the innocent spouse claim was being considered by the Service.

In January YR11, Revenue Officer 3 referred Petitioner's innocent spouse request to Examination for consideration. On March 14, YR11, Examination notified Revenue Officer 3 that they were working the on Petitioner's request. Examination asked Revenue Officer 3 to follow-up in 30 days. Revenue Officer 3 contacted Examination on April 18, YR11 and Examination requested additional time to respond.

By September 12, YR11, Revenue Officer 3 had not heard from Examination. Revenue Officer 3 spoke with the local Examination unit and was told to contact Service Center 1. Revenue Officer 3 talked to the Exam Manager at Service Center 1, and was informed that Petitioner's case could not be located. At Exam Manager's request, Revenue Officer 3 forwarded another copy of Petitioner's innocent spouse referral to Exam Manager.

By May YR12, Examination still had not provided a determination on Petitioner's innocent spouse request. Revenue Officer 3 forwarded a copy of the innocent spouse referral to Problem Resolution on May 20, YR12.

On May 30, YR12, the Internal Revenue Service office in Office 6 sent Petitioner a letter denying Petitioner's claim for the innocent spouse relief requested in the letter dated November 12, YR10.

Petitioner filed a Claim for Refund and Request for Abatement on July 26, YR12. The Internal Revenue Service denied the request for abatement on August 15, YR12. In its explanation for the denial, the Service stated that the YR1 deficiency was not attributable to any error or delay by the Internal Revenue Service in the performance of a ministerial act. Further, the Service apologized for the obvious delay in processing Petitioner's innocent spouse claim, but stated that this delay was not a factor in determining the deficiency for YR1.

On December 2, YR12, Petitioner paid the outstanding tax and interest owed for the YR1 tax year in full.

LAW AND ANALYSIS

I.R.C. § 6404(e)(1), as in effect for the tax year at issue, authorizes the Internal Revenue Service to abate interest on a deficiency or a payment if it is determined that the interest was attributable to an error or delay by an IRS employee in the performance of a ministerial act. The error or delay must have occurred after the taxpayer was contacted in writing with respect to the deficiency or payment, and no significant aspect of the error or delay can be attributable to the taxpayer.

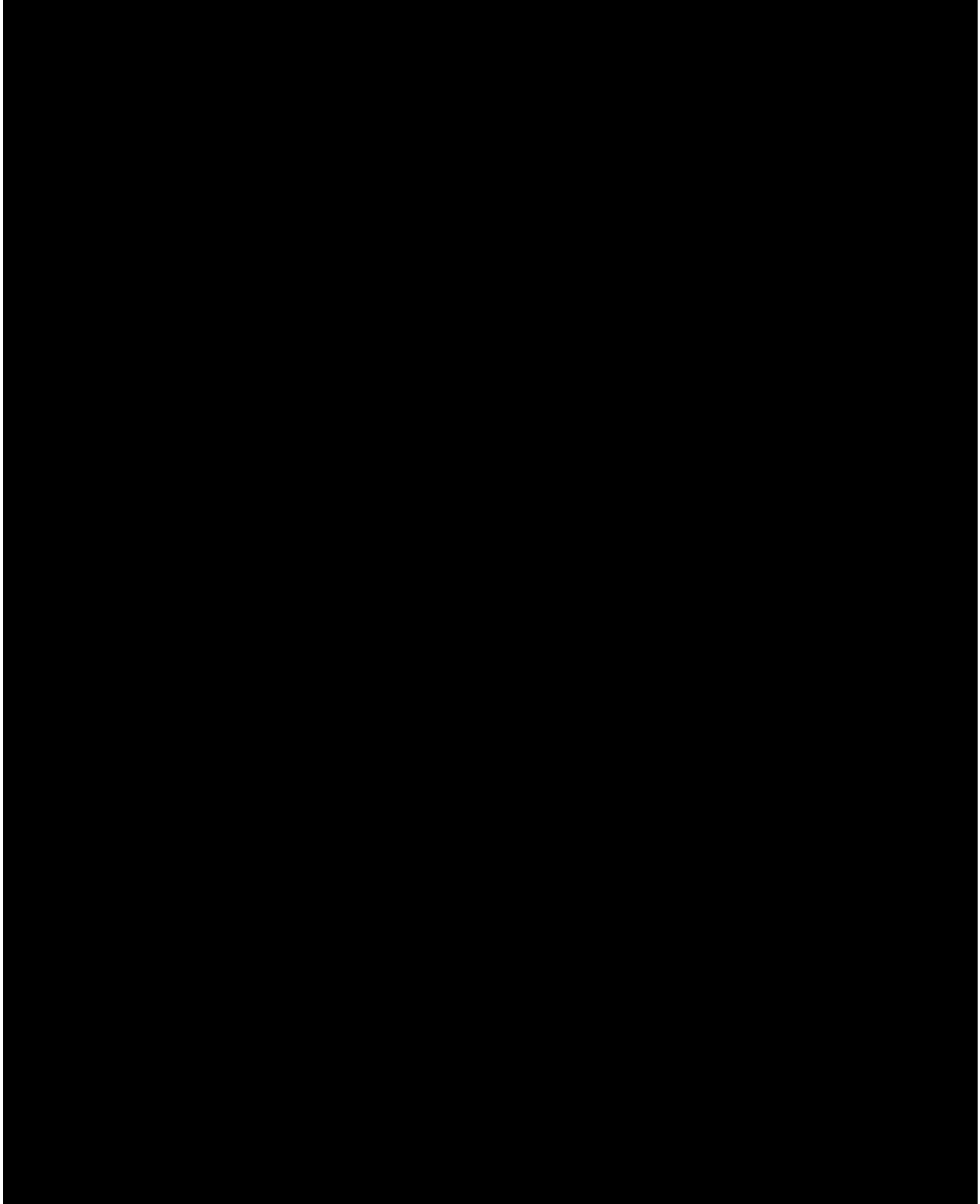
Section 301.6404-2T(b)(1) of the Temporary Treasury Regulation defines a "ministerial act" as a procedural or mechanical act that does not involve the exercise of judgment or discretion, and that occurs during the processing of a taxpayer's case after all prerequisites to the act, such as conferences and review by supervisors, have taken place. A ministerial act does not involve the exercise of judgment or discretion, nor does it involve a decision concerning the proper application of the tax law.

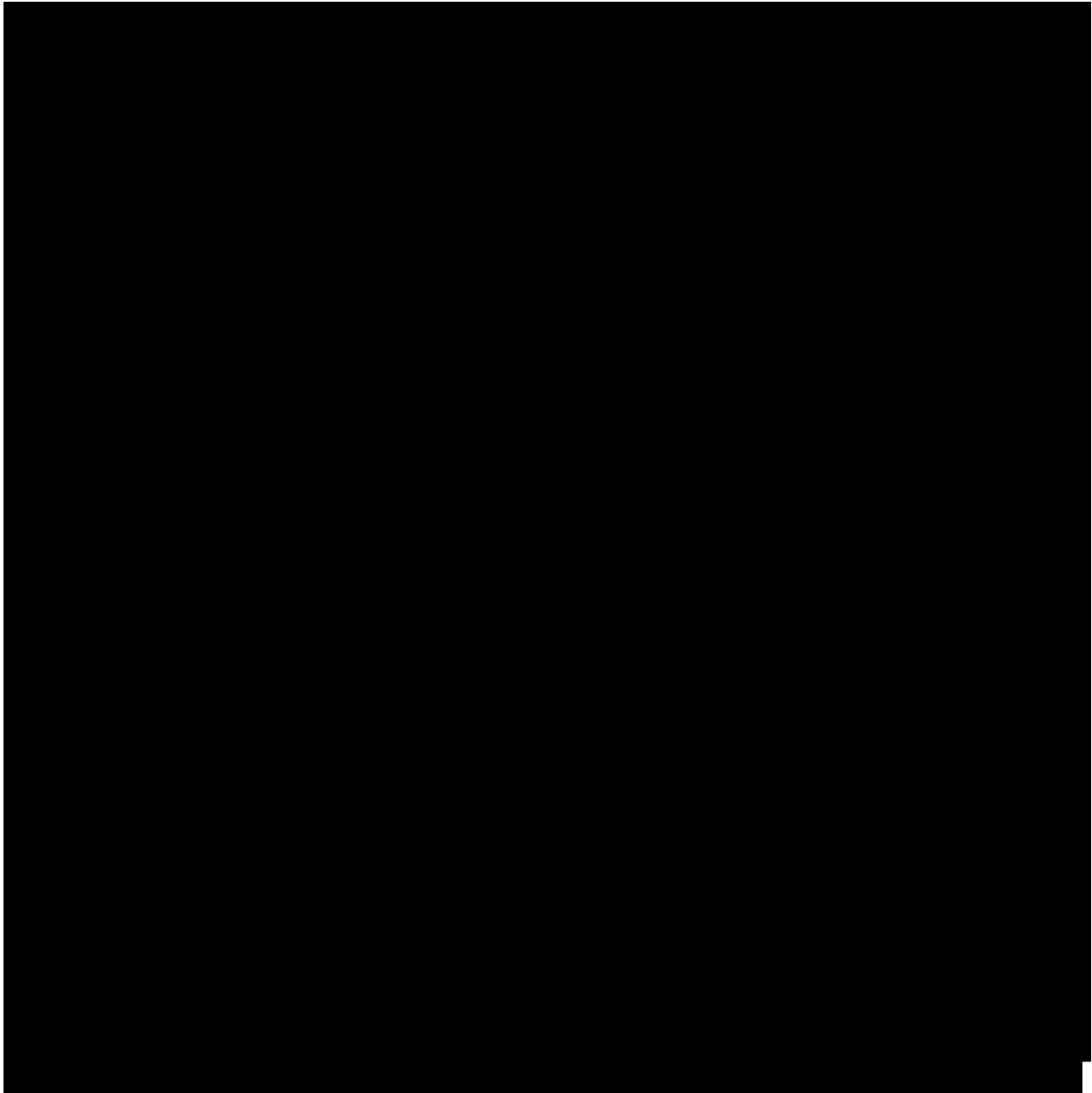
In enacting I.R.C. § 6404(e), Congress did not intend that the abatement of interest provision "be used routinely to avoid payment of interest." Rather, Congress intended abatement of interest to be used in instances "where failure to abate interest would be widely perceived as grossly unfair." H.R. Rep. No. 426, 99th Cong., 1st Sess. 844 (1985); S. Rep. No. 313, 99th Cong., 2d Sess. 208 (1986).

There is no question that there have been significant delays in this case. Nevertheless, not all delays may result in the abatement of interest. The Service is only authorized to abate those delays which are attributable to ministerial acts. In addition, even if the Service determines that all of the abatement of interest requirements of I.R.C. § 6404(e)(1) have been met, the decision to abate is discretionary, not mandatory.

Based on the information provided, there appears to have been omissions that may be defined as ministerial. Primarily, these were failures to transfer the innocent spouse issue to the appropriate function for determination.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS:





Please call if you have any further questions.

By: _____
SARA M. COE
Chief, Procedural Branch