



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

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OFFICE OF
CHIEF COUNSEL

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MEMORANDUM FOR OFFICE OF INTEREST AND PENALTY ADMINISTRATION

OP:EX:ST:I&P

Attn: Cathy Wides

FROM: Chief, Procedural Branch

SUBJECT:

This memorandum is in response to your request for our views on whether the Internal Revenue Service is authorized to abate interest in the situation presented below.

LEGEND:

X	=
YR1	=
YR2	=
YR3	=
YR4	=
Notice	=
\$a	=
\$b	=
\$c	=
\$d	=
\$e	=
\$f	=
\$g	=
\$h	=
\$i	=
\$j	=

ISSUE:

Whether the I.R.C. § 6621(c) "hot interest" that accrued on taxpayer's YR1 tax liability is subject to abatement under I.R.C. § 6404(e)(1).

CONCLUSION:

The Internal Revenue Service is not authorized to abate interest in this case because the requirements of I.R.C. § 6404(e)(1) have not been met.

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FACTS:

X filed a consolidated federal income tax return, Form 1120 for the taxable year ending December 31, YR2 ("the YR2 return"). The YR2 return was due on March 15, YR3.

On March 15, YR3, the Service credited X with \$a received with X's Form 7004, Application for Automatic Extension of Time to File Corporation Income Tax Return. On April 8, YR3, X received a six-month extension to file the YR2 return on or before September 15, YR3. The YR2 return, received by the Brookhaven Service Center on September 16, YR3, showed taxes due in the total amount of \$b and net credits claimed of \$c as of the due date of the return.

Prior to the Service's receipt of the YR2 return, on September 13, YR3, X remitted \$d, the unpaid balance of tax that X computed to be due for the YR2. Though the payment of tax was late, X's remittance failed to include any payment towards interest. The Service did not credit the remittance to YR2 as a tax payment, but rather, to YR3 as a Federal Tax Deposit ("FTD"). (The Service later reversed this credit, and properly credited X's YR2 liability with a tax payment of \$d as of the September 13, YR3 payment date.)

On November 25, YR3, based on the return filed on September 16, YR3, and on the \$d shortfall referenced above and notwithstanding X's payment, the Service assessed X income tax for YR2 in the total amount of \$b, a Failure to Pay penalty in the amount of \$e, and interest in the amount of \$f. The Service's records show that a "Request For Payment" ("the Notice") was also generated on the assessment date. While the Notice correctly reflected the assessed tax in the amount of \$b and net credits claimed of \$c as of the return due date, it did not reflect an overpayment from YR1 in the amount of \$g or the tax payment of \$d. Accordingly, the Tax Statement portion of the Notice showed "AMOUNT YOU OWE" of \$h, consisting of a tax underpayment of \$i ("YR2 Balance") and penalty and interest in the above assessed amounts.

In addition to stating the amount owed, the Notice reflected a list of payments that the Service credited to X's YR2 account. The payment of \$d was not included in the list. The bottom of the Notice also reflected an "AMOUNT YOU OWE" of \$h. In addition, however, were two other lines. The three lines are illustrated as follows:

AMOUNT YOU OWE.....	\$h
LESS PAYMENTS NOT INCLUDED.\$	_____
PAY ADJUSTED AMOUNT.....\$	_____

X failed to pay \$h or an adjusted amount within 30 days as instructed by the Notice. Instead, on December 2, YR3, X returned the Notice to the Service, with information to trace the payment of \$d that was not credited against the YR2 Balance. When payment was not made to the Service within 30 days of the Notice,

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the Service assessed "hot interest" in accordance with I.R.C. § 6621(c)¹. The \$d payment was subsequently credited to X's YR2 Balance. After this payment was credited, X's underpayment for the YR2 was \$j, an amount in excess of \$100,000. On February 3, YR4, the assessed penalty was fully abated and a portion of the assessed interest was abated.

LAW AND ANALYSIS

I.R.C. § 6404(e)(1) 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 Internal Revenue Service employee's error or delay in the performance of a ministerial act. The error or delay can be taken into account only after the Service has contacted the taxpayer 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.²

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).

¹Effective, January 1, 1991, an increased rate of interest on a large corporate underpayment ("hot interest") begins to run after the 30th day after the issuance of a 30-day letter or of a notice of deficiency, whichever is earlier. I.R.C. § 6621(c)(2)(A). In the case where deficiency procedures do not apply, as in the case of a taxpayer failing to remit the full amount of income taxes shown as due on its return on or before the last day prescribed for payment, the I.R.C. § 6303 assessment notice is the notice which begins the 30-day period. In this case, the November 25, YR3, notice was the I.R.C. § 6303 assessment notice that began the 30-day period.

²The final regulation, although generally applying to interest accruing on deficiencies, or payments of the type of tax described in I.R.C. § 6212(a), for tax years beginning after July 30, 1996, contains the same definition of ministerial act. Treas. Reg. § 301.6404-2(b).

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The Service has not disputed that the failure to properly credit the \$d payment to X's YR2 account was an error. Although the Service erred, § 6404(e)(1) only authorizes the Service to abate interest when the Service's error or delay is attributable to a ministerial act. It is not clear from the information provided whether the crediting of the \$d payment to X's YR3 account instead of its YR2 account was attributable to a ministerial act or to something else.

Even if the error was attributable to a ministerial act, the Service is not authorized to abate the interest because the hot interest was triggered by X's failure to follow the instructions on the Notice, not by the Service's error. The facts indicate that X's delay in paying the amount reflected on the Notice was due to X's misinterpretation of X's options. X alleges that if it had concluded that the Notice could trigger an applicable date for purposes of applying hot interest, the only option would have been to pay the \$h shown as due on the Notice within 30 days of the date of such notice. X suggests that it is grossly unfair for it to have to pay the liability twice. X's interpretation of its options is incorrect. As illustrated above, the Notice directs X to subtract payments not reflected on the Notice and to "pay adjusted amount" within 30 days. In this case, X chose not to pay any amount within 30 days.

You have indicated that X may have delayed payment because I.R.C. § 6621(c) was effective shortly before the Notice was issued and X may have been unfamiliar with § 6621(c)'s strict requirements. Regardless, this would not provide a basis for abating interest under § 6404(e)(1). The delay would still have been attributable to X's actions or inactions, not the Service's.

The Service also did not err in issuing the Notice to X. The Notice reflected the amount of tax that was owed by X prior to the application of X's credits and payments. Even after the credits and payments were correctly applied and incorrect penalties and interest abated, X still owed a substantial amount of interest and would have been sent the Notice in any event.

Though the Service is not authorized to abate X's interest under I.R.C. § 6404(e)(1), we note that if X has an overlapping overpayment, X may have another avenue for reducing the differential created by § 6621(c) -- § 6621(d). Section § 6621(d) authorizes "global interest netting" when certain requisites are met. For information on requesting interest netting under § 6621(d), X should review Rev. Proc. 99-19.

If you have any further questions, please call the branch telephone number.

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