INTERNAL REVENUE SERVICE
NATIONAL OFFICE TECHNICAL ADVICE MEMORANDUM

December 7, 2001

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Release Date: 3/29/2002
Third Party Contact:
Index (UIL) No.: 6404.00-00
CASE MIS No.:

Chief, Appeals Office

Taxpayer's Name:
Taxpayer's Address:

Taxpayer's Identification No:
Years Involved:
Date of Conference:

LEGEND:
husband =
T =
X =
Y =

Office 1 =
Office 2 =

Year 1 =
Year 2 =
Year 3 =
Year 4 =
Year 5 =
Year 6 =

Date 1 =
Date 2 =
Date 3 =
Date 4 =
Date 5 =
Date 6 =
Date 7 =
Date 8 =
Date 9 =
Date 10 =

Date 11 =
Date 12 =
Date 13 =
Date 14 =
Date 15 =
Date 16 =
Date 17 =
Date 18 =
Date 19 =
Date 20 =

$a =
$b =
$c =
$d =
$e =

ISSUE(S):

1. Whether either the amended return or the Form 870 filed by the taxpayers constitutes a waiver of restrictions on assessment that would result in the suspension of interest absent a timely notice and demand.

2. Whether the Service has performed a ministerial error with respect to the taxpayers' Year 2 tax year for which additional interest should be abated.

3. Whether the taxpayers are entitled to abatement of interest due to the Service's failure to issue a notice and demand.

CONCLUSION(S):

1. The taxpayers' amended return does not constitute a waiver of the restrictions on assessment and collection under I.R.C. § 6213(d); however, the Form 870 does, at least for limited purposes. As such, it appears the taxpayers' may be entitled to an abatement for the period beginning 30 days after the filing of the Form 870 and ending with the issuance of the notice and demand, but only with respect to the additional tax resulting from the audit of the amended return, in the amount of $b.

2. Except as indicated in Issue 1 above, additional interest over the amounts already abated by Mr. X and those amounts relating to the Form 870 should not be abated. It appears that a significant portion of the delay was due to various aspects of a related audit and the remainder is not a ministerial error which would require the abatement of additional amounts.

3. The taxpayers are not entitled to additional abatement as the result of the Service's failure to issue a notice and demand with respect to interest. The failure of the Service

to provide such notice does not in and of itself provide a basis for abatement.

FACTS:

Husband entered into an investment that affected his joint tax liability with his wife for taxable years Year 1 through Year 5. An examination of the taxpayers' returns was commenced in Year 4, and all relevant tax years were held in suspense.

On Date 1, taxpayers filed an amended return for Year 2 asserting an additional tax liability in the amount of $a that was paid on or about Date 2. Because a notice of deficiency had not yet been issued to the taxpayers, the Service was not restricted from assessing the additional tax due per the return. Accordingly, the tax liability was properly assessed pursuant to either under I.R.C. § 6201(a), which allows for assessment of taxes shown on a return, or I.R.C. § 6213(b)(4), which allows for assessment of any amount paid as a tax or in respect of a tax upon receipt of the payment. No interest on the additional amount was paid or assessed at that time.

In Date 4, Revenue Agent Y of the Office 1 District began an examination of the taxpayers' returns for the Year 2 and Year 3 taxable years. Account transcripts were ordered by Mr. Y for taxable years Year 1 through Year 5, and were shared with the taxpayers' representative. The transcript for Year 2 showed the assessment of the additional tax in Year 6 and that no interest was assessed at that time.

On Date 5, the taxpayers' representative executed a Form 870, Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment (Form 870). Additional tax for Year 2 of $b was assessed on Date 8. Interest of $c on the additional tax was assessed on Date 10, and was paid.

On Date 11, taxpayers' representative requested the computations of interest from Year 1 through Year 5 from the Problem Resolution Office at the Office 2 Service Center. On Date 12, the Problem Resolution Office responded, but did not include the calculations. A second request was made, and the matter was reassigned to the Problem Resolution Office in Office 1 on Date 13. In Date 14, the matter was assigned to the Interest Coordinator of the Office 1 District, Mr. X.

Mr. X recalculated the interest and asserted that there were additional amounts still due and owing for interest in the amount of $d for taxable year Year 2 as of Date 19. At that time, a decision was made to abate interest from Date 10 to Date 15. On Date 18, the Service forwarded to the taxpayers a Statement of Account which stated that a net amount refundable to the taxpayers was available in the amount of $e. On Date 19, the Service assessed the additional interest of $d less the outstanding credit of $e.

On Date 17, the taxpayers filed Form 843 requesting an abatement of the additional interest assessed for Year 2, more specifically from Date 1, the date petitioner's assert the original payment of $a was made, to Date 15, when the interest was assessed and billed.

LAW AND ANALYSIS:

Issue 1:
I.R.C. § 6601(a) provides that "[i]f any amount of tax imposed by this title... is not paid on or before the last date prescribed for payment, interest on such amount... shall be paid for the period from such last date to the date paid." I.R.C. § 6601(c) provides that where, in the case of a deficiency as defined by section 6211, a waiver of restrictions under section 6213(d) has been filed, if notice and demand for payment of the deficiency is not made within 30 days after the filing of the waiver, interest is suspended for the period beginning on the 31st day and ending on the date notice and demand is issued. I.R.C. § 6213(d) grants taxpayers the right to waive restrictions on assessment and collection of all or part of any deficiency by filing a signed notice in writing. A waiver may be submitted at any time, whether or not a notice of deficiency has been issued.

Here, the taxpayers have argued that the filing of their amended return with payment on Date 1, which was posted as paid on Date 2, constitutes a waiver under I.R.C. § 6213(d). Generally, an amended return, without a more specific statement, does not constitute a waiver for purposes of I.R.C. § 6213(d). While an amended return is a signed notice in writing, nowhere in the text of the form is there language stating or implying that the document is meant to waive restrictions on collection and assessment. In the present matter, the taxpayers also did not attach any language to the document which would imply they intended to waive restrictions.

The taxpayers point to General Counsel Memoranda 36343 (July 23, 1975) (GCM 36343), asserting the proposition that it is Service policy that amended returns with payment are a waiver of section 6213 rights. They point to conclusion 2 of the GCM which states "We agree that there is serious doubt whether the filing of an amended return without paying the additional tax can be treated as a waiver of the restriction of Code Sec. 6213(a)." The taxpayers argue that this statement implies that the converse is true: that where an amended return is filed with payment, this constitutes a waiver. We agree the GCM suggests that an amended return accompanied by payment could be construed as a waiver. GCM, however, are not controlling statements of Service position or practice and cannot be cited as precedent. Further, we disagree that as a matter of law an amended return filed with payment necessarily constitutes a waiver of restrictions on assessment. In the instant case, the Service was not prohibited from assessing the amounts shown as due on the amended return. Consequently, a waiver of restrictions on assessment was not necessary. Under these circumstances, in the absence of an affirmative statement on the part of the taxpayers, we decline to interpret the amended return as an affirmative unambiguous waiver.

In the alternative, the taxpayers have argued that a Form 870 would constitute a waiver for purposes of I.R.C. § 6213(d). A Form 870 does generally qualify, and is in fact titled, as a waiver of restrictions on assessment and collection with respect to the specific deficiency listed on the form. The Form 870 filed in this case on Date 5, refers only to the additional tax of $b for taxable year Year 2, which was assessed on Date 8.

It does not appear that notice and demand for payment of the $b was made within 30 days of the filing of the Form 870, which date was approximately Date 6. As such, interest on the $b should be suspended from that date until the issuance of the notice and demand, or, at the latest, Date 8.

Issue 2:
I.R.C. § 6404(e)(1) provides, in relevant part, that the Service may, within its discretion, abate interest on any deficiency where the interest is attributable to an error or delay by an officer or employee of the IRS in performing a ministerial act.[1]

The taxpayers argue that interest accrued due to the unreasonable delay in assessing interest due and owing, and that, under I.R.C. § 6404(e)(1)(A), any additional interest should be abated.[2] The taxpayers assert that as the tax liability was assessed on Date 3, the related interest should have been assessed at that time instead of more than five years later.

The regulations define a ministerial act as one that does not involved the exercise of judgment or discretion. I.R.C. § 301.6404-2(b)(1). Although the facts on this point are not entirely clear, we believe that the delay was, at least in part, caused by the fact that the issue of whether the taxpayers would be subject to increased interest pursuant to I.R.C. § 6621(c) was still in dispute. The applicability of that section is generally not determined until late in the audit process and while it is still in question, it appears that interest cannot be computed or assessed. See generally I.R.M. 10.5.1 and 13.2.0. It appears that the relevant audit was unresolved until Date 9.

Also, an IRS system freeze code was placed on the account that prevented interest assessment during the time period in question. We are unable to determine with certainty why the freeze code was placed on the account. We believe, however, that such a code was placed on the module, in all likelihood, because the case was still under audit and because the applicability of I.R.C. § 6621(c) was still in issue. The placement of the freeze code was a ministerial act, placed as a matter of policy rather than as an exercise of judgment. However, the delay was not unreasonable, nor was

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[1]I.R.C. § 6404(e) has been amended under § 301 of Taxpayer Bill of Rights (TBOR) II, Pub. L. 104-168, 110 Stat. 1452, 1457 (1996), to permit the Service to abate interest with respect to any unreasonable error or delay resulting from managerial acts as well as ministerial acts. The new provision only applies to interest accruing with respect to a deficiency or payment for taxable years beginning after July 30, 1996, and is not applicable to the instant case.

[2]Congressional intent in enacting I.R.C. § 6404(e) was for the Service to abate interest where it was at fault and where the failure to do so would be perceived as grossly unfair. H. Rept. 99-426, at 844 (1985), 1986-3 C.B. (Vol. 2) 1, 844; S. Rept. 99-313, at 208 (1986), 1986-3 C.B. (Vol. 3) 1, 208. However, Congress did not intend that abatement "be used routinely to avoid payment of interest." Id.

an error made in performing this ministerial act. Where income from a tax shelter partnership is being attributed to the partners, audits relating thereto may take several years. However, the resolution of the audit, at which time the freeze would have been removed and interest assessed, took place in Date 9. As a result, Mr. X has abated interest for the 16 month period from Date 7 to Date 16. Thus, to the extent necessary, interest has already been abated.[3]

Issue 3:
I.R.C. § 6303 states that the Service shall give notice and demand for payment as soon as practicable and within 60 days after making an assessment.

I.R.C. § 6601(e)(1) states (1) that interest shall be paid upon notice and demand, and (2) that interest "shall be assessed, collected, and paid in the same manner as taxes."

The taxpayers argue that interest which resulted from the Service's failure to provide a notice and demand for payment should be abated. To support their contention, they point first to I.R.C. § 6303, in conjunction with I.R.C. § 6601(e)(1), i.e., that, as interest is to be treated in the same manner as taxes, then the Service must send out a notice and demand for payment as it would for tax. We agree with this interpretation. However, a notice and demand must be sent after making an assessment. It is our understanding that no assessment was made with regard to the interest until Date 19. Accordingly, there was no requirement to make notice and demand until after that date.[4] In addition, we note that there appears to be no consequence for the failure to issue such a notice and demand, at least with respect to suspension of interest or abatement of interest accrued. Rather, the notice and demand is only a prerequisite to administrative collection methods. See Security Indus. Ins. Co. v. United States, 830 F.2d 581, 587 (5th Cir. 1987). In fact, the court in United States v. Toyota of Visalia, 772 F. Supp. 481 (E.D. Cal. 1991), aff'd without opinion, 988 F.2d 126 (9th Cir. 1993), cited

[3]The taxpayers argue that, per the transcript, the Service tried twice to assess interest when the return was filed, but failed due to freeze codes in place. We believe this reference is to TC 340 entries at various points on the transcript. A TC 340 is triggered as notification that restricted interest, with beginning and ending dates different from normal interest, should be posted but must be manually calculated. As an increased interest amount was still in issue into 1997, interest could not be computed and entered, nor could it be assessed. Thus, no error or delay is necessarily evidenced from the posting.

[4]We should also note that under I.R.C. § 6601(g), interest may be collected as long as the tax may still be legally collected. I.R.C. § 6502(a) allows for collection of the underlying tax for a 10-year period following the assessment date. Here, the tax liability was assessed on Date 3; therefore, the associated tax (and the interest) may be properly collected until Date 20.

by the taxpayers,[5] makes the following statement, directly contrary to the taxpayers' position:

> Furthermore, as the United States argues, the IRS did not need to provide Toyota with the notice and demand required by statute because these provisions only apply to prevent the IRS from administrative collection procedures. The failure to give notice and demand does not in and of itself prevent the collection of taxes, interest or penalties by judicial action. (citations omitted)

Accordingly, while we agree the Service is required to give notice and demand for payment of interest within 60 days of the assessment of the interest, we disagree that the Service is bound to give notice and demand for payment of interest within 60 days of the assessment of the tax liability.

The taxpayers may also be suggesting that the failure to issue a notice and demand

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[5]The taxpayers in the instant case have cited United States v. Toyota of Visalia, 772 F. Supp. 481 (E.D. Cal. 1991), suggesting that it supports their position in the following manner:

> The Court in ruling against Toyota noted that the "restricted interest assessment" was not based on a new liability, but on previously (emphasis added) assessed interest. The implication being that if the interest arose from a new matter, it should have been assessed and notice and demand should have been made. In the case of the T, the tax liability arose from a new liability, the tax shown on the amended return, and such interest should have been assessed when the amended return was filed.

We do not agree with the taxpayers' conclusion as to the inferences to be drawn from the court's comments in Toyota. Among other things, the taxpayer in Toyota argued that the United States's assessment of interest was invalid either because the government failed to provide the taxpayer adequate notice before taking enforced collection action or because the government violated the provisions of sections 6201 and 6601, requiring interest to be assessed and collected in the same manner as taxes. In rejecting the taxpayer's arguments, the district court noted that the late assessment of interest related back to earlier assessments of tax, penalty, and interest on the same year. The court disagreed with the taxpayer's contention that the interest assessment in Year 5 was a new matter requiring separate notice and demand.

In this case the taxpayers are not contesting the propriety of notice and demand. They are arguing that the assessed interest should be abated due to the Service's alleged failure to comply with collection provisions. The conclusions reached by the court in Toyota simply do not support this argument.

was a ministerial error for which interest should be abated. The failure to follow such a requirement is not a ministerial error. We would note that the legislative history for what was enacted as I.R.C. § 6404(d) states "Congress believed that where an IRS official acting in his official capacity fails to perform a ministerial act after contacting the taxpayer in writing, such as issuing either a statutory notice of deficiency or notice and demand for payment after all procedural and substantive preliminaries have been completed, authority should be available for the IRS to abate the interest independent of the underlying tax liability." General Explanation of the Tax Reform Act of 1986, Pub. L. No. 99-514, H.R. 3838 (May 4, 1987). This tends to imply that Congress would consider the failure to send notice and demand a ministerial error. However, the provision also states that it is a ministerial error "after all procedural and substantive preliminaries have been completed." In this case, no assessment of interest was made until Date 19. Assessment, as stated above, is a prerequisite to the issuance of a notice and demand. Therefore, we conclude there was no ministerial error in failing to make notice and demand that would result in the abatement of associated interest.

CAVEAT(S)

A copy of this technical advice memorandum is to be given to the taxpayer(s). Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.