



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

OFFICE OF
CHIEF COUNSEL

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MEMORANDUM FOR DIRECTOR OFFICE OF INTEREST AND PENALTY
ADMINISTRATION
OP:EX:ST:I&P
Attn: Pauline Riendeau

FROM: Chief, Procedural Branch
Field Service Division

SUBJECT: Delays Due to Customer Service Staffing/Interest Abatement

During the recent tax filing season, the Commissioner's office directed the temporary reassignment of Internal Revenue Service employees from Examination and (other functions) to Customer Service. Since the Internal Revenue Service committed itself to providing 24 hour assistance to customers, in many Districts almost every office had employees reassigned. As a result, there was a shortage of employees to work on tax matters that were already pending before the Service. There have been numerous questions asking if interest should be abated due to delays in the processing or examination of pending cases attributable to these reassignments. You have asked for our advice on whether the Service is authorized to abate interest in this situation.

For tax years beginning prior to July 31, 1996, Internal Revenue Code section 6404(e)(1) allows the Service to abate only interest on a deficiency or payment where the interest is attributable in whole or in part to an error or delay by an officer or employee of the Internal Revenue Service in performing a ministerial act. A ministerial act is a procedural or mechanical act that does not involve the exercise of judgment or discretion, and that occurs during the processing of a case after all prerequisites to the act have taken place. Temp. Treas. Reg. § 301.6404-2T(b)(1). In addition, error or delay may be taken into account only if the taxpayer has not significantly contributed to the error or delay and the error or delay must have occurred after the taxpayer has been contacted in writing with respect to the deficiency or payment. 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." H.R. Rep. No. 426, 99th Cong., 1st Sess. 844 (1985); S. Rep. No. 313, 99th Cong., 2d Sess. 208 (1986). Rather Congress intended abatement of interest to be used in instances "where failure to abate interest would be widely

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perceived as grossly unfair." *Id.* The decision to reassign employees from Examination to Customer Service was not a ministerial act.

The Taxpayer Bill of Rights 2 (Pub. L. No. 104-168, 110 Stat. 1452 (1996)) expanded Internal Revenue Code section 6404(e)(1). For tax years beginning after July 30, 1996, section 6404(e)(1) now permits the Service to abate interest where there is an *unreasonable* error or delay in performing a *managerial* act. A managerial act is defined as an administrative act that occurs during the processing of a taxpayer's case involving the temporary or permanent loss of records or the exercise of judgment or discretion relating to management of personnel. Treas. Reg. § 301.6404-2(b)(1). Examples of managerial acts include the granting of leave for an extended period of time and the decision not to reassign a case during the employee's absence. See Treas. Reg. § 301.6404-2(c), example 5.

A general administrative decision is not a managerial act for which interest can be abated. Treas. Reg. § 301.6404-2(b)(1). The Regulation provides two examples of a general administrative decision. One example involves a delay in commencing the examination of a taxpayer's return until the processing of another return, for which the statute of limitations is about to expire, is completed. Treas. Reg. § 301.6404-2(c), example 8. The example concludes that this is a general administrative decision because it is a decision on how to prioritize the processing of returns based on the expiration of the statute of limitations. The other example involves the decision to delay the processing of the return of a taxpayer, who has invested in a tax shelter and reported a loss from the tax shelter on the taxpayer's income tax return, until the completion of an examination of the tax shelter. Treas. Reg. § 301.6404-2(c), example 7. The example concludes that the decision to delay processing the taxpayer's return is a general administrative decision because it is a decision on how to organize the processing of tax returns.

The Commissioner's decision to allocate the Service's resources by temporarily assigning personnel to Customer Service is similar to the decisions made in examples 7 and 8 of section 301.6404-2(c) of the Regulation. Therefore, this decision is a general administrative decision on which abatement of interest may not be based. Accordingly, the Service is not authorized to abate interest that accrued as a result of the reassignment of employees from the Examination division (or any other function) to Customer Service.

If you have any questions, please contact Pamela Wilson Fuller at (202) 622-7950.