



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

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INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

MEMORANDUM FOR DAVID OTTO

DISTRICT COUNSEL SOUTHWEST DISTRICT COUNSEL

FROM: Deborah Butler
Assistant Chief Counsel CC:DOM:FS

SUBJECT: Abatement of Interest

This Field Service Advice responds to your memorandum dated December 15, 1999. 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

X=	Year 1=
A=	Year 2=
B=	Year 3=
C=	Year 4=
D=	Year 5=
E=	Year 6=
F=	Year 7=
G=	

ISSUE

Would a determination by the Service not to abate interest on X's income tax liabilities for the years Year 1, Year 2, and Year 3, pursuant to section 6404(e), be an abuse of discretion?

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CONCLUSION

The Service does not have authority to abate interest that accrued during the period which began the day X mailed his returns to the tax auditor, February 19, Year 7, and ended the day the Service assessed and sent collection notices for the tax shown on the returns, September 13, Year 7, and, therefore, the Service could not abuse its discretion. Woodral v. Commissioner, 112 T.C. 19, 25 (1999).

Likewise, the Service does not have discretion to abate the interest that accrued on X's income tax liability for tax years Year 1, Year 2, and Year 3 for the period after September 13, Year 7, because there were no errors or delays in the performance of a ministerial act. Dundore v. Commissioner, T.C. Memo. 2000-45.

FACTS

X failed to file income tax returns for tax years Year 1 through Year 4. The Service sent inquiry notices to the taxpayer regarding the delinquent returns as follows:

<u>Tax Year</u>	<u>Date of First Inquiry</u>
Year 1	September 13, Year 3
Year 2	May 28, Year 4
Year 3	September 3, Year 6
Year 4	May 19, Year 6

On November 14, Year 6, X attended an Internal Revenue Service Problem Solving Day where X was assisted by a tax auditor. On February 19, Year 7, X mailed his delinquent income tax returns to the tax auditor, and the tax auditor's secretary forwarded the returns to the service center for processing on March 31, Year 7.

The returns filed for Year 1 and Year 2 reflected that X owed \$A and \$B, respectively. The returns filed for Year 3 and Year 4 reflected X was due refunds of \$C and \$D, respectively. X did not include payment with his returns. He did, however, have some back-up tax withholdings and had made several prior payments with regard to his potential tax liabilities for the years Year 1 through Year 4.

The service center sent a letter dated June 8, Year 7, confirming X's delinquent returns had been received.¹ On June 16, Year 7, X called the tax auditor to discuss the penalties and interest in his case. The tax auditor suggested that X contact the Taxpayer Advocate.

¹Receipt by the service center was acknowledged on a Form 3210.

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On July 1, Year 7, X called the Taxpayer Advocate, and the Taxpayer Advocate informed X that the service center had lost his returns. X stated he was waiting to get a bill from the Service so he could full pay² and get the back-up tax withholding released. The Taxpayer Advocate received copies of the taxpayer's returns for the years Year 1 through Year 4 on July 26, Year 7. These returns were forwarded to the service center for processing on August 2, Year 7.

On September 13, Year 7, the Service assessed the amounts reported on X's returns for tax years Year 1 through Year 4, and the Service sent the first collection notices. On or about the same date, September 13, Year 7, X filed a Form 843 requesting the abatement of interest for the years Year 1, Year 2, Year 3, and Year 4, for the period after February 19, Year 7. X's claim for abatement is based on the fact that from the time he mailed his returns to the tax auditor until the time he was assessed he was waiting for a bill from the Service so that he could discharge his liability. X has now paid his tax liabilities for Year 1, Year 2, Year 3, and Year 4. For Year 1 and Year 2, the Service has abated X's failure to pay penalties. For Year 3 and Year 4, no failure to pay penalties were assessed. For Year 2 and Year 3, the Service has assessed a failure to pay estimated tax penalty.

As of December 6, Year 7, X had accrued interest payable for Year 1, Year 2, and Year 3 of \$E, \$F, and \$G, respectively. For Year 2, the interest constituted interest on the failure to pay estimated tax penalty and on the amount of tax which X failed to pay in Year 2. For Year 3, the interest constituted interest on the failure to pay estimated tax penalty, which began accruing on September 13, Year 7.³

LAW AND ANALYSIS

Congress granted the Service discretionary authority to abate the assessment of interest if a taxpayer's situation meets the requirements provided in section 6404. In particular, section 6404(e)(1) provides that the Service may abate interest assessed on any payment of any tax to the extent that any delay in the payment is attributable to an officer or employee being erroneous or dilatory in performing a ministerial act. The error or delay shall be taken into account only if no significant aspect of the error or delay is attributable to the taxpayer, and only after the

²The Investigation History sheet states: "He's waiting to get bill from IRS to full pay so he can get BU W/H released."

³The Service has imposed interest on the failure to pay estimated tax penalty for Year 2 and Year 3 from the day that notice and demand for the amount was sent only because X failed to pay this amount within 21 days of notice and demand. See I.R.C. § 6601(e)(2)(A).

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taxpayer has been contacted in writing with respect to the payment. I.R.C. § 6404(e)(1); see also Temp. Treas. Reg. § 301.6404-2T(a)(2).

Congress did not intend the abatement of interest provisions to be used routinely. Rather, Congress intended the provision to be used where failure to abate would be perceived as grossly unfair. H.R. Rep. No. 99-426, at 844 (1985); S. Rep. No. 99-313, at 208 (1986). In the legislative history, Congress stated if a taxpayer files a return but does not pay the taxes due section 6404 would not permit abatement of this interest regardless of how long the IRS took to contact the taxpayer and request payment. H.R. Rep. No. 99-426, at 844-845; S. Rep. No. 99-313, at 208.

In this case, a significant aspect of, and indeed the entire reason for, the accrual of interest was X's failure to timely determine and pay his tax liability. The interest accrual was not due to a failure or delay on the part of the Service. Despite the fact that X's returns for tax years Year 1, Year 2, Year 3, and Year 4 were due on April 15, Year 2, April 15, Year 3, April 15, Year 4, and April 15, Year 5, respectively, X mailed his returns to the Service on or about February 19, Year 7, without including payment of the amount owed. Regardless of how long it took the Service to assess and send collection notices and notwithstanding the fact that the Service lost X's late filed returns, X's failure to determine and pay his liability is the reason for the interest accruals. Krugman v. Commissioner, 112 T.C. 230, 239 (1999).

Another reason that X is not entitled to interest abatement in this case is that the first written contact with regard to X's payment was sent to X on September 13, Year 7, when the Service assessed X's liability and sent a collection notice. In Krugman, the petitioner failed to file tax returns for several years. When petitioner did file his returns he did not include payment, and respondent had to send a notice stating the amount that petitioner owed. The court in Krugman held that petitioner was not entitled to relief under section 6404 for the period prior to the time that the first notice regarding payment was sent to petitioner.

Although X received inquiries from the Service prior to the time he filed his returns, these inquiries did not state a deficiency or ask for payment so they were not the first written contacts. Rather, the notices were just inquiry notices regarding X's delinquent returns. Therefore, the Service did not have discretion to abate interest that accrued prior to September 13, Year 7, and could not abuse its discretion. Krugman v. Commissioner, 112 T.C. at 239.

Finally, interest accrued on petitioner's liability after the Service first assessed petitioner's liability and sent a collection request is wholly attributable to petitioner's failure to pay. See Gross v. Commissioner, T.C. Memo 2000-44. Therefore, abatement of interest is not appropriate.

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In the memorandum sent requesting this field service advice, X's situation is compared to Douponce v. Commissioner, T.C. Memo. 1999-398. In Douponce, the court held that the Service abused its discretion by refusing to abate assessed interest because there was a delay caused by the Service's failure to notify petitioner of the correct amount owed. Petitioner, in Douponce, called the Service and asked an employee to quote the total amount that petitioner owed. At the time the employee quoted the amount owed, petitioner's liability had been assessed, along with most of the interest that had accrued on his liability; however, there was a period for which interest had not been assessed. The employee erroneously failed to access the most recent information and quoted an amount lower than the amount that petitioner owed. This error caused petitioner to make a payment that did not fully satisfy his liability. Once petitioner became aware of this error, petitioner paid. The court held that the error of the employee was an error in the performance of a ministerial act. See Treas. Reg. 301.6404-2(c) Ex.11. The court further held that this error in performing a ministerial act caused a delay in payment and the Service abused its discretion by refusing to abate the assessed interest that was due to the error.

The facts in Douponce are not the same as the facts in X's situation. In Douponce there was an error or delay in the performance of a ministerial act which delayed payment. See Treas. Reg. 301.6404-2(c) Ex.11. In X's situation, there were no erroneous or dilatory performances in ministerial duties which caused interest to accrue.

Your incoming memorandum suggested the loss of records was a ministerial act. This is incorrect. Section 6404(e) was amended by the Taxpayer Bill Of Rights 2 to grant the Service authority to abate interest in situations where there are errors or delays in the performance of a managerial act. This amendment only applies to tax years beginning after July 30, 1996. Krugman v. Commissioner, 112 T.C. at fn. 7; Woodral v. Commissioner, 112 T.C. at fn. 8. The treasury regulations, which are consistent with the legislative history, define a managerial act as acts such as the loss of records by the Service, the transfer of Service personnel, the granting of extended illness leave, the authorization of extended personnel training, or the granting of extended leave. See Treas. Reg. § 301.6404-2(c) Ex. 6; TBOR 2, § 301(c), Pub. L. 104-168, 110 Stat. 1457 (1996).

After X sent his returns to the tax auditor, the tax auditor sent X's return to the service center for processing. By letter dated June 8, 1999, the service center confirmed that X's delinquent returns had been received. At some point after this letter, it appears the returns were lost. The delay in this case, caused by the supposed lost returns, was an error in performing a managerial act, not a ministerial act. Because the tax years at issue began prior to July 30, 1996, even if X had not substantially contributed to the delay, the Service did not have discretion to abate the interest in this case. Woodral v. Commissioner, 112 T.C. at fn. 8.

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CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

For the reasons stated above, this case should not be settled in accordance with the proposed settlement provided in the memorandum sent requesting the field service advice. A final determination denying X's request should be sent to X.

Please call the Field Service Division if you have any further questions.

DEBORAH BUTLER
ASSISTANT CHIEF COUNSEL

By: _____
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