Office of Chief Counsel
Internal Revenue Service
memorandum

Number: **201215006**
Release Date: 4/13/2012

CC:PA:03:MAJARBOE:
POSTS-139082-11

UILC: 6404.00-00

date: February 15, 2012

to: Lindsay A. O'Neil
Interest Abatement Coordinator
(Technical Services)

from: Gerald R. Ryan
Senior Technician Reviewer
(Procedure & Administration)

---

subject: Authority of Interest Abatement Coordinators

ISSUES

1) Can interest abatement claims be resolved with a no consideration letter instead of a final determination letter?

2) Can an Interest Abatement Coordinator (IAC) enter into a closing agreement to resolve the disallowance of an interest abatement claim?

BACKGROUND

SB/SE Technical Services provided the following information in this request for advice. Under current procedures, when the Service receives an interest abatement claim, it is considered by an IAC who makes the initial determination as to whether the claim should be allowed, partially allowed, or disallowed. The taxpayer is then sent a letter that informs him of the IAC's initial determination and also informs him that he has 30 days to seek additional consideration with the Office of Appeals (Appeals) if he disagrees with the determination. If 30 days passes and the taxpayer does not contact Appeals, then the IAC sends a final determination letter to the taxpayer. If, however, the taxpayer contacts Appeals within the 30 day period, Appeals will consider the claim anew. If the requested abatement is ultimately disallowed, Appeals will issue the final determination letter to the taxpayer. The final determination letter, whether issued by an IAC or Appeals affords the taxpayer the ability, pursuant to section 6404(h), to

challenge the Service's decision in the Tax Court within 180 days. If the taxpayer does not petition the Tax Court within 180 days, then the Service's decision is final and the Service closes its case. Under the Service's current procedures an IAC must wait until the Service's decision is final, sometimes in excess of six months, before closing the case.

In an attempt to streamline the procedures for resolving interest abatement claims, SB/SE Technical Services requested advice on issues concerning the denial of a taxpayer's claim for interest abatement. The first issue is whether IACs are required to send a final determination letter, as opposed to a no consideration letter, for all interest abatement claims that contain the required information for processing. There are two specific situations where you ask whether a no consideration letter could be used instead of a final determination letter: 1) where the taxpayer is making a claim for abatement of interest that has been paid, but the statutory period of limitations under section 6511 on filing a claim for refund has expired, and 2) where the taxpayer requests interest abatement claiming that the Service was not timely in processing the taxpayer's amended return which reported a reduction in tax. Our understanding is that the no consideration letter proposed would be comparable to the Letter 916C, Claim Incomplete for Processing; No Consideration currently used by Exam in various cases where a taxpayer's claim is not processable. Additionally, advice is sought whether a section 7121 closing agreement may be used to resolve claims where the taxpayer agrees to a determination disallowing interest abatement. It is proposed that the use of a closing agreement would allow a taxpayer who agrees to a partial or full disallowance of his abatement to settle the issue conclusively, and with finality. By issuing a no consideration letter or entering a closing agreement, an IAC would immediately close out the case, rather than waiting for the expiration of the period during which the taxpayer may administratively appeal or petition the Tax Court to challenge the disallowance of the interest abatement claim.

LAW & ANALYSIS

Section 6404(e)(1) provides that "[i]n the case of any assessment of interest on- (A) any deficiency attributable in whole or in part to any unreasonable error or delay by an officer or employee of the Internal Revenue Service (acting in his official capacity) in performing a ministerial or managerial act, or (B) any payment of any tax described in section 6212(a) to the extent that any unreasonable error or delay in such payment is attributable to such an officer or employee being erroneous or dilatory in performing a ministerial or managerial act, the Secretary may abate the assessment of all or any part of such interest for such period. For purposes of the preceding sentence, an error or delay shall be taken into account only if no significant aspect of such error or delay can be attributed to the taxpayer involved, and after the Internal Revenue Service has contacted the taxpayer in writing with respect to such deficiency or payment."

IRM 20.2.7.4.2 IRC 6404(e)(1) Criteria (03-09-2010), sums up the criteria for making a claim under section 6404(e)(1) as follows:

(1) the statutory period of limitations on filing a claim per IRC 6511 is open;
(2) the claim is for tax years beginning after December 31, 1978;
(3) the claim relates to interest on taxes described in IRC 6212(a) i.e., income, estate, gift, and certain excise taxes (employment taxes are specifically excluded);
(4) an unreasonable error or delay occurred in relation to the performance of a ministerial or managerial act;
(5) the error or delay occurred after the taxpayer was contacted in writing with respect to the examination, deficiency, or payment; and
(6) no significant aspect of the error or delay can be attributed to the taxpayer/representative.

A request for abatement of interest previously paid also constitutes a claim for refund of that interest. A claim for refund of interest is subject to the normal period of limitations under section 6511. Such a claim must be filed "within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later . . . ." Section 6511(a). If a taxpayer requests an abatement of interest paid, and his claim is made after expiration of the section 6511(a) period of limitations, the Service does not have any discretion to abate interest under section 6404(e). Likewise, when a taxpayer requests interest abatement because the Service did not timely address his amended return which reported a reduction in tax, section 6404(e) is not applicable because the tax shown on the original return is a self-assessed liability and the subsequent acceptance of the amended return does not create a deficiency.[1] Even though section 6404(e) would not apply in these two scenarios, a final determination letter is still appropriate for the reasons detailed below.

Section 6404(h) provides that the Tax Court shall have jurisdiction over any action brought by a taxpayer to determine whether the Secretary's failure to abate interest was an abuse of discretion, and may order an abatement if such action is brought within 180 days after the date of the mailing of the Secretary's final determination not to abate such interest. See Hinck v. United States, 550 U.S. 501, 503 (2007). A claim for abatement and a final determination by the Service are prerequisites to Tax Court review under section 6404(h). See Bourekis v. Commissioner, 110 T.C. 20, 26 (1998). Additionally, the Tax Court provides the exclusive forum for judicial review of the Service's refusal to abate interest. Hinck at 503.

In enacting section 6404(h), Congress gave the Tax Court jurisdiction to review whether the Service's failure to abate interest was an abuse of discretion. The Tax Court has held that it has broad jurisdiction to review the Service's determinations not to abate interest. See Woodral v. Commissioner, 112 T.C. 19, 22-3 (1999). The Service should not take any action that could be construed as limiting this jurisdiction. Because the Tax Court has exclusive jurisdiction to review the Service's refusal to abate interest, by

[1] If after examining the amended return an additional liability is assessed, section 6404(e) may be applicable to any interest that accrues on the additional liability, but only if it is determined that there was a ministerial or managerial error or delay after the taxpayer was contacted in writing.

failing to provide a final determination as required under section 6404(h), the Service would be denying the taxpayer access to challenge its determination in any legal forum. Moreover, the Tax Court could find a no consideration letter by the Service a "final determination" anyway for purposes of conferring section 6404(h) jurisdiction. Even if the Tax Court refused to review a no consideration letter issued by the Service, finality might never be achieved in these cases because the taxpayer would have the right to continue submitting his interest abatement claim until he received a final determination letter and the corresponding Tax Court rights. Although the Service's authority to abate interest is only triggered once the statutory requirements for abatement are met, any consideration by the Service of whether the statutory requirements are met in a particular claim is subject to review by the Tax Court. Thus, where the Service receives a processable[2] claim for interest abatement, such claim must be considered and if the requested abatement is disallowed a final determination letter should follow.

Section 7121(a) of the Internal Revenue Code authorizes the Treasury Secretary or his delegate to enter into binding agreements with a taxpayer relating to the liability of such person in respect of any internal revenue tax for any taxable period. These agreements are referred to as "closing agreements." Section 7121(b) provides that a closing agreement is "final and conclusive . . . [and] except upon a showing of fraud or malfeasance, or misrepresentation of a material fact . . . the case shall not be reopened as to the matters agreed upon or the agreement modified . . . ."

A closing agreement sometimes is erroneously equated to a contract. Because it is limited by statute, a closing agreement is less flexible than a contract. Under general contract law principles, parties to a contract are not locked into a contract's terms forever. Parties to a contract are ordinarily as free to change the contract terms after making them as they were to make the contract in the first instance. Restatement (First) of Contracts § 408 (1932). Conversely, the closing agreement statutory requirement of finality distinguishes a closing agreement from a regular contract. Although the interpretation of closing agreements is governed by federal common law contract principles, United States v. National Steel Corp., 75 F.3d 1146, 1150 (7th Cir. 1996), where the closing agreement "statute conflicts with general and otherwise governing contract law principles, the statute governs." Marathon Oil Co. v. United States, 42 Fed. Cl. 267, 274 (1998), aff'd 215 F.3d 1343 (Fed. Cir. 1999). Thus, while contract law generally governs closing agreements, the statutory requirement of finality trumps any general contract law principle that would allow a closing agreement to be modified or changed. In practice this means that once a closing agreement is made "it is final, conclusive and binding upon both the taxpayer and IRS, for the purpose of the agreement is to terminate and dispose of tax controversies once and for all," barring one of the statutory exceptions of fraud, malfeasance, or a misrepresentation of material

[2] A claim would be non-processable where a taxpayer failed to submit the information required to make a determination. For example, a statement "I should not have to pay interest" standing alone, without reference to a specific liability or tax year, would not be a processable claim for interest abatement. In the case of a non-processable claim a no consideration letter is appropriate. The taxpayer then has the ability to provide any information necessary for the consideration of the claim.

fact. S&O Liquidating Partnership v. Commissioner, 291 F.3d 454, 458 (7th Cir 2002). "The notion being that where the taxpayer agrees that the determination is just and the department thinks it is just they can come to an agreement and clean it up forever." Hearings on H.R. 8245 before the Senate Committee on Finance, 67th Congress, 1st Sess. 129 (1921)(statement of T.S. Adams, Tax Advisor, Treas. Dept.)

The authority to enter into these final and conclusive agreements has not been delegated lightly. Delegation Order 8-3, formerly known as DO-97, Rev. 34, found at IRM 1.2.47.4, is the general delegation order regarding closing agreements. DO 8-3 delegates the authority to enter into and approve a written agreement with any person relating to the internal revenue tax liability of such person for a taxable period ended prior to the date of the agreement. IRM 1.2.47.4(5). A closing agreement involving interest abatement would be covered under this delegation order as it involves an internal revenue tax liability for a taxable period that would have ended prior to the date of the closing agreement. DO 8-3 provides that with respect to SB/SE this authority is delegated no lower than to SB/SE Director of Compliance. IRM 1.2.47 (6). Effective October 1, 2000, the title of Director of Compliance was replaced by several directorships, including the SB/SE Director of Examination. Thus, the SB/SE Director of Examination would have authority to enter into this type of closing agreement. Since SB/SE Technical Services reports to the SB/SE Director of Examination, there is no one within SB/SE Technical Services with the requisite authority to sign such a closing agreement. Thus, neither an individual Interest Abatement Coordinator, nor a manager in the Technical Services group to whom the Interest Abatement Coordinator would report, would have the requisite authority to enter into such an agreement for a case within the jurisdiction of SB/SE.

CONCLUSIONS

1) A no consideration letter is appropriate only in very limited circumstances where a taxpayer fails to submit the information required for consideration of the interest abatement claim. Otherwise, any consideration by the Service of whether the statutory requirements for interest abatement are met in a particular claim is subject to review by the Tax Court. Therefore, if a claim is disallowed the taxpayer should receive a final determination letter.

2) An Interest Abatement Coordinator does not have the requisite authority to enter into a closing agreement regarding an interest abatement issue. The lowest representative of the Service within SB/SE who would have the authority to do so would be the SB/SE Director of Examination. Certainly, an IAC could solicit such a closing agreement, but an interest abatement claim issue within the jurisdiction of SB/SE would have to be executed on behalf of the Commissioner by the SB/SE Director of Examination.