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**From:** [REDACTED]

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**To:** [REDACTED]

**Cc:**

**Bcc:**

**Subject:** Availability of section 6404(a) or (e) abatement for the interest accruing on section 6201(a)(4) restitution-based assessments

You asked about whether under IRC section 6404(e) the IRS had the authority to abate interest that had accrued on a restitution-base assessment (RBA) made under IRC section 6201(a)(4).

The short answer is that section 6404(e) does not apply to any interest on an RBA, because an RBA is not a deficiency or a tax described in section 6212(a).

Section 6404(e) provides the IRS statutory authorization to abate interest in certain cases where the assessment of interest is attributable to unreasonable errors or delay by the IRS. However, it is not a blanket authorization for abatement of interest on any and all taxes. Section 6404(e)(1) limits the IRS's ability to abate interest to a particular set of reasons, namely based on delay caused by a ministerial or managerial act by an officer or employee of the IRS. Section 6404(e) interest abatement authority is also, however, based on the type of tax to which the interest relates. The tax to which that interest relates must also be "a deficiency" (section 6404(e)(1)(A)), or "any payment of any tax described in section 6212(a)" (section 6404(e)(1)(B)). As explained in IRM 20.2.7.4.1(1)(c), the types of taxes referred to in section 6404(e)(1)(A) and (B) are income, estate, and gift taxes, as well as certain excise taxes. RBAs, on the other hand, are not deficiencies or any other tax described in section 6212(a). Restitution is assessed under section 6201(a)(4), and based on the amount ordered as restitution by a federal court. Although restitution in a criminal tax case is calculated based on harm to the government determined from the defendant's failure to pay a tax, it is itself not a determination of tax. Section 6201(a)(4) authorizes the IRS to assess an amount of restitution ordered "for failure to pay any tax... in the same manner as if such amount were such tax." Section 6213(b)(5) provides that this RBA is not subject to deficiency procedures. Because an RBA is not a tax subject to deficiency procedures as described in section 6212(a), interest running on an RBA may not be abated under the limited authority of section 6404(e).

The only statutory authorization potentially available to the IRS to abate interest accruing on an RBA is the general abatement authority under section 6404(a). That

authority, however, is also narrow. Section 6404(a) authorizes the IRS to abate any unpaid portion of an assessment that is (1) excessive in amount, (2) assessed after the expiration of the period of limitation properly applicable thereto, or (3) erroneously or illegally assessed. With respect to interest accruing on an RBA, whether the interest accruing on an RBA is excessive is a mathematical calculation based on the proper interest accrual formula. As provided in the underlying regulations, “excessive in amount” means “in excess of the correct tax liability.” Treas. Reg. section 301.6404-1(a); see also King v. Commissioner, 829 F.3d 795, 798 (7th Cir. 2016). Section 6501(c)(11) provides that the assessment of an RBA may be made at any time, so there is no statute of limitations expiration that applies here. Lastly, since the legal authority to assess restitution ordered for the failure to pay a tax is provided under section 6201(a)(4), there does not appear to be a question about whether the RBA was itself proper. Therefore, if the amount of restitution was properly assessed and the interest on the RBA under section 6601 was properly calculated, there does not appear to be any authority for the IRS to abate interest on an RBA under section 6404(a), either.