Department of the Treasury

Internal Revenue Service Office of Chief Counsel

Notice

CC-2011-020

September 15, 2011

Reversal of Unauthorized Abatements Following Referral to

Subject: the Department of Justice

Upon incorporation

Cancel Date: into the CCDM

<u>Purpose</u>

This Notice provides guidance on correcting assessment records when taxes are abated in error by the Internal Revenue Service following referral to the Department of Justice.

Background

The Service sometimes erroneously abates assessments for taxes that have been referred to Justice for collection. For example, in <u>United States v. Pound</u>, 2010 WL 2803918 (E.D. Okla. 2010), after the taxpayer's assessed tax liabilities were reduced to judgment by Justice, the Service fully abated the tax liabilities in disregard of the litigation freeze codes in place on the taxpayer's accounts and without consulting Counsel or Justice. The district court granted the taxpayer's motion to vacate the judgment on the ground that the tax assessments were abated, rejecting the Government's argument that the abatements were made in error and could be reversed.

For the reasons discussed below, we disagree with the court's holding in <u>Pound</u> that, under these circumstances, the abatement cannot be reversed and the Service's transcripts cannot be corrected to reflect the existence of the original assessment. A post-referral abatement made without approval by Justice is void and the abatement should be reversed and the Service's transcript records corrected.

Discussion

Section 6404(a) provides the Service with the authority to abate an assessment of tax that is (1) excessive in amount; (2) assessed after the expiration of period of limitations properly applicable

¹ After a case has been referred to Justice, a litigation freeze code, "TC 520," is placed on the taxpayer's account to prevent the Service from taking any unauthorized action on the account. <u>See</u> IRM 21.5.6.4.45 (07-21-2010) <u>—W Freeze</u>. When a freeze code is in place on the account, Service personnel are instructed to take no action on the account without first contacting the "litigation contact" and getting appropriate authorization. The litigation contact is responsible for contacting any other necessary parties, including Justice attorneys handling the litigation.

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thereto; or (3) erroneously or illegally assessed. In general, when an assessment is abated by the Service, the abatement cannot be reversed if the Service later decides that the abatement was incorrect. <u>Crompton-Richmond Co. v. United States</u>, 311 F. Supp. 1184, 1186 (S.D.N.Y. 1970). Instead, the Service must make a new assessment, assuming the statute of limitations for assessment is still open. Id.

The rule against reversing the abatement may not apply when the abatement is not made pursuant to section 6404(a). For example, the judicially-created clerical error doctrine provides authority for reversal of an abatement of the original assessment in limited circumstances. Crompton-Richmond Co., 311 F.Supp. at 1186; In re Becker, 407 F.3d 89, 99-101 (2nd Cir. 2005); Bugge v. United States, 99 F.3d 740, 745 (5th Cir. 1996). Under the clerical error doctrine, an abatement that occurs as the result of a mistake of fact or bookkeeping error may be reversed if there is no prejudice to the taxpayer. The doctrine rests on the theory that the abatement was not made pursuant to section 6404(a) and is a nullity. Under the doctrine, the original assessment is re-instated and, therefore, remains valid. Crompton-Richmond Co., 311 F.Supp. at 1186-87.

Abatement of tax for a tax period referred to Justice that is made without the approval of Justice is invalid and may be reversed, because the Service lacks the authority to take such action on the taxpayer's account without Justice approval. The conduct and control of all federal tax litigation, except in the Tax Court, is vested in the Department of Justice. 28 U.S.C. §§ 515-519. Section 5 of Executive Order 6166, reprinted in 5 U.S.C. § 901, provides, "As to any case referred to the Department of Justice for prosecution or defense in the courts, the function of the decision whether and in what manner to prosecute, or to defend, or to compromise, or to appeal, or to abandon prosecution or defense, now exercised by any agency or officer, is transferred to the Department of Justice." In addition to Title 28 and the Executive Order, section 7122(a) gives the Attorney General the exclusive authority to compromise a case arising under the Internal Revenue Code after referral to Justice for prosecution or defense.

Following the referral of a case, Justice has the exclusive authority to make and approve adjustments to the referred tax liabilities. Any abatement made by the Service in order to adjust a referred tax liability must be authorized by Justice or it will be void. Because the post-referral abatement is void, it is not necessary to reassess. In order that the Service's transcripts reflect correctly the existing assessment, the post-referral abatement must be reversed and the transcripts of the taxpayer's tax accounts corrected.²

For these purposes, a referral to Justice is considered to be in effect with respect to any tax liability once a letter from the Service is sent to Justice requesting the institution of a civil action to collect or recover taxes and providing the authorization required under section 7401, or requesting Justice to defend the Service in a suit brought against the Service. <u>See</u> CCDM

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² Given the limitations of the Service's systems, in order to reverse a post-referral abatement, the Service must use the same procedures used to reverse a clerical error abatement. <u>See IRM 25.6.1.10.2.4 (10-01-2007) Erroneous Abatement</u>; IRM 3.17.243.2 (10-01-2009) <u>Reversal of Erroneous Abatements</u>. If the reversal of the abatement is made while the assessment statute of limitations is open, the reversal is accomplished through the Master File by the entry of a Transaction Code 290. The TC 290 is used because the system does not have a transaction code for abatement reversal. Although the TC 290 is labeled as a "quick assessment" on the transcript and is dated as of the date it is input, this is merely the procedure used to ensure that the Service's records again reflect the original assessment. If the abatement is reversed after the statute of limitations on assessment has closed, a NonMaster File account must be created to ensure that the Service's records again reflect the original assessment.

34.6.1.3 (08-11-2004) <u>Preparation of Suit Letters</u>, 34.5.1.1.2 (08-11-2004) <u>Defense Letters</u>. A referral to Justice terminates when Justice notifies the Service in writing that it is declining to file suit or otherwise terminates a suit and releases jurisdiction of the referred tax liabilities to the Service. In cases in which Justice has obtained a judgment for the tax liabilities, authority thereafter remains with Justice, even if it returns the case to the Service for collection. CCDM 34.6.1.2.10 (08-11-2004) <u>Settlement Procedures</u>.

The Service's current procedures provide that reversal of an abatement is appropriate only under the clerical error doctrine. IRM 25.6.1.10.2.4.2.2 (03-01-2006) <u>Clerical Errors</u>; IRM 3.17.243.2 (10-1-2009) <u>Reversal of Erroneous Abatements</u>. The current IRM provisions are being revised to reflect accurately all of the situations in which the Service can reverse abatements,³ including situations involving post-referral abatements.

Litigation Guidelines

Following the discovery of an unauthorized post-referral abatement, Counsel, in consultation with Justice, should work with Service personnel to determine the circumstances of the abatement and, if necessary, to correct the Service's systems to reflect the unabated assessment. If the issue of the validity of the assessment comes up in litigation, Counsel should defend the assessment on the grounds stated above. Reversing the abatement may also require the Service to revoke any corresponding release of the federal tax lien and, if necessary, file a new notice of federal tax lien.⁴

All cases involving post-referral abatements should be coordinated with Procedure and Administration, Branch 3 at (202) 622-3600 or Branch 4 at (202) 622-3630.

/s/

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³ An abatement of tax under section 6404(c), following discharge in bankruptcy, may be reversed because these abatements reflect only the Service's judgment that the account is not currently collectible. <u>See</u> Chief Counsel Notice 2001-014.

⁴ Pursuant to final regulations amending Treas. Reg. § 6323(g)-1(a)(3)(i), a release of lien shall not alter or impair the rights of the United States to property that is the subject of a judicial proceeding commenced prior to the release of lien, at least with respect to the parties to the litigation. 76 Fed. Reg. 18384-01 (April 4, 2011).