

Office of Chief Counsel  
Internal Revenue Service  
**Memorandum**

**Number: 200623060**

**Release Date: 6/9/2006**

CC:PA:APJP:B03:JAJebe  
POSTF-159686-05

UILC: 6404.01-01, 6404.01-03

date: April 07, 2006

to: Associate Area Counsel (Philadelphia, Group 1)  
(Small Business/Self-Employed)

from: Blaise G. Dusenberry  
Special Counsel, Administrative Provisions & Judicial Practice  
(Procedure & Administration)

---

subject: Missed Assessment versus Erroneous Abatement

This Chief Counsel Advice responds to your request for assistance dated January 9, 2006. This advice may not be used or cited as precedent.

ISSUE

Whether these facts should be treated as a clerical error, for which erroneous abatements may be reversed after the expiration of the assessment statute of limitations, or a missed, or barred, assessment to be listed in "excess collections."

CONCLUSION

As there has been no assessment, there cannot have been an abatement, and, therefore, the abatement cannot be corrected. This can only be a missed assessment.

FACTS

The taxpayer timely filed his \_\_\_\_\_ income tax return. Due to an error, this return and the associated tax posted to the module for taxable year \_\_\_\_\_. The Philadelphia Campus discovered the error when the \_\_\_\_\_ return was filed, abated the tax on the \_\_\_\_\_ module, and sent the \_\_\_\_\_ return to be reprocessed. The

return never posted to the module for taxable year . By this time, the assessment statute of limitations with respect to taxable year had expired. Therefore, an assessment of tax on the module was never made.

On his return, the taxpayer reported a tax liability of \$ and a withholding credit of \$ . From the withholding credit, \$ was transferred to Excess Collections. The balance of the withholding credit (\$ ) was both erroneously refunded to the taxpayer and applied to taxpayer's outstanding liability for taxable year . The application of the funds to the liability for was eventually reversed, and the credit of \$ was replaced in the module.

After the return failed to post in the module, the Philadelphia Campus sent the case to Austin with instructions to recover the erroneous refund using erroneous abatement procedures. The Austin Campus returned the file to Philadelphia after concluding that the erroneous abatement procedures did not apply and the case should be treated as a missed, or barred, assessment.

### LAW AND ANALYSIS

Generally, the Service must assess taxes within three years after the tax return is filed. I.R.C. sec. 6501. Section 6404(a) provides that the Service may abate the unpaid portion of the assessment of any tax or liability that is (1) excessive in amount, (2) assessed after the expiration of the period of limitations, or (3) erroneously or illegally assessed. Various courts have held that where an amount is abated pursuant to section 6404(a), and it is later determined that the abatement was both erroneous and the result of a clerical error, that abatement may be reversed after the period of limitations has expired. See, e.g., Matter of Bugge, 99 F.3d 740(5<sup>th</sup> Cir. 1996); Crompton-Richmond Co., Inc. v. United States, 311 F. Supp. 1184 (S.D.N.Y. 1970). Here, an assessment was never made with respect to the amount "abated" from the module, so the "abatement" was not performed under section 6404(a). No assessed amounts were ever abated pursuant to section 6404(a) for either taxable year or . Since there is no assessment or abatement, there cannot be an erroneous abatement. Because there is no erroneous abatement to correct, these facts can only be considered as a missed assessment.

From the facts presented, it appears that the taxpayer's liability per his return has been satisfied, and that only the amount erroneously refunded remains outstanding on his account for the taxable year. At this point, since there is no erroneous abatement, the only means to recover the erroneous refund in this case is to file an erroneous refund suit under section 7405 in district court.

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

POSTF-159686-05

3

Please call (202) 622-7950 if you have any further questions.

cc: