

Department
of the
Treasury

Internal
Revenue
Service

Office of
Chief Counsel

Notice

CC-2010-012

July 8, 2010

Litigation Position in Tax Court
Cases Involving Abatement Claims
Subject: Under IRC § 6404(a)(1) **Effective until further**
Cancel Date: notice

I. Purpose

This notice states the litigation position of the Commissioner in Tax Court cases involving abatement claims under section 6404(a)(1). The notice also states the proper construction of section 6404(a)(1), responds to alternative arguments that have been raised concerning construction of the statute, and requires coordination with the National Office in cases implicating construction of the statute.

II. Proper Construction of Section 6404(a)(1)

The Commissioner's authority to abate the unpaid portion of any tax, or any liability in respect thereof, is set forth in section 6404. This provision does not grant the Commissioner unfettered freedom to abate tax, interest, and penalties. The statute, instead, sets forth limited circumstances under which abatement of an assessment is authorized. Section 6404(a) authorizes the Commissioner to abate assessments that are legally flawed in certain key respects and consequently without proper legal foundation. Specifically, section 6404(a) authorizes abatement of assessments that are (1) excessive in amount, (2) assessed after the expiration of the applicable period of limitation, or (3) erroneously or illegally assessed. This notice focuses on the first of these bases for abatement, namely abatement of assessments that are excessive in amount.

The legislative history of section 6404(a) is limited and provides little guidance to the construction of the phrase "excessive in amount" as used in section 6404(a)(1). Canons of statutory construction dictate that an attempt be made to interpret a statute according to its plain meaning and to give operative effect to every word in a statute. See, e.g., *Astrue v. Ratliff*, 560 U.S. ____ (2010); *Jimenez v. Quarterman*, 555 U.S. ____ (2009). Black's Law Dictionary defines "excessive" as "greater than what is usual or proper." Black's Law Dictionary 561 (6th ed. 1990). "Excessive" is elsewhere similarly defined as greater than a "normal, usual, reasonable, or proper limit." The American Heritage Dictionary of the English Language 638 (3d ed. 1992). These definitions illustrate that an amount can only be described as excessive by reference to that amount which is proper or usual. Once the proper amount is determined, only the amount that is greater than what is proper constitutes an excessive amount.

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The proper amount of an assessment is the amount of a taxpayer's liability calculated under the Internal Revenue Code. The Commissioner's authority under section 6404(a)(1) to abate assessments that are excessive in amount extends, therefore, only to amounts that exceed the amount determined by correct application of the tax law. See Matter of Bugge, 99 F.3d 740, 745 (5th Cir. 1996) (when inadvertently correcting the problem of duplicate assessments by abating both the original and the duplicate assessment, the Commissioner exceeded his authority under section 6401(a)(1) when he abated the original assessment, since that amount was proper under the law and consequently not excessive). The Treasury Regulations under section 6404(a)(1) adopt this principle by providing that the Commissioner may abate an assessment that is "in excess of the correct tax liability." Treas. Reg. § 301.6404-1(a).

An example of an excessive assessment that may be abated under section 6404(a)(1) is an interest assessment made without proper account of statutorily prescribed interest suspension provisions. Such an assessment may be abated or reduced under authority of section 6404(a)(1) to ensure the assessment reflects the correct amount of tax liability due under law. See In re Burns, 974 F.2d 1064, 1066 (9th Cir. 1992) (abatement under section 6404(a) involves reduction of a mistakenly high or excessive assessment to the lesser amount required by correct application of the law).

III. Responding to Alternative Arguments

Arguments have been advanced that misconstrue section 6404(a)(1) and erroneously conclude that the provision authorizes abatement for reasons other than an incorrect computation of the amount of tax liability. In H&H Trim & Upholstery Co., Inc. v. Commissioner, T.C. Memo. 2003-9, for example, the Tax Court interpreted the language of section 6404(a)(1) expansively to embrace an abatement broadly designed to promote fairness in tax administration. In H&H Trim, the court held that the phrase "excessive in amount" in section 6404(a)(1) authorized abatement of interest correctly computed as a matter of law, but which struck the court as unfair because the Commissioner had reported an incomplete payoff amount to the taxpayer. The H&H Trim opinion has been cited as support for abatements designed to ameliorate the perceived harsh or unfair impact of lawfully applied Code provisions. See, e.g., 16 Boris Bittker & Lawrence Lokken, Federal Taxation of Income, Estates and Gifts ¶ 114.1.1 (2010), available at 1997 WL 440091 (W.G.&L.) (citing H&H Trim for the proposition that an assessment may be abated as excessive under section 6404(a) when the assessment is unfair).

The overly expansive construction of section 6404(a)(1) to include abatements designed to ameliorate the perceived unfairness of correctly applied law fails to harmonize with section 6404 as a whole. The other subparts of section 6404(a) address assessments that lack proper legal foundation. Specifically, section 6404(a)(2) addresses assessments made beyond the applicable statute of limitations and section 6404(a)(3) addresses assessments erroneously or illegally made. In other words, both (a)(2) and (a)(3) similarly address the problem of legally infirm assessments. To construe abatement authority under 6404(a)(1) as limited to addressing a unique class of legally deficient abatements fits naturally with the rest of section 6404(a). To construe the section 6404(a)(1) abatement authority to address the more generalized problem of collection unfairness does not. The words of a statute must be read in context and with a view to their place in the overall statutory scheme. Food and Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000).

Reading section 6404(a)(1) to authorize abatement of assessments that are legally correct also would render superfluous large portions of section 6404. If "excessive" as used in section 6404(a)(1) simply means "unfair," there is little need for section 6404(a)(2), allowing the

