

[4830-01-u]

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 301

[REG-209276-87]

RIN 1545-AV32

Abatement of Interest

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations relating to the abatement of interest attributable to unreasonable errors or delays by an officer or employee of the IRS in performing a ministerial or managerial act. The proposed regulations reflect changes to the law made by the Tax Reform Act of 1986 and the Taxpayer Bill of Rights 2. The proposed regulations affect both taxpayers requesting abatement of certain interest and IRS personnel responsible for administering the abatement provisions.

DATES: Written comments and requests for a hearing must be received by April 8, 1998.

ADDRESSES: Send submissions to: CC:DOM:CORP:R (REG-209276-87), room 5226, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered between the hours of 8 a.m. and 5 p.m. to: CC:DOM:CORP:R (REG-209276-87), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW, Washington DC. Alternatively, taxpayers may submit comments electronically via the INTERNET by selecting the "Tax Regs" option on the IRS Home Page, or by submitting

comments directly to the IRS Internet site at
http://www.irs.ustreas.gov/prod/tax_regs/comments.html.

FOR FURTHER INFORMATION CONTACT: Concerning the regulations,
David Auclair, (202) 622-4910 (not a toll-free number).

Concerning submissions, Michael Slaughter, (202) 622-7190 (not a
toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document contains proposed amendments to the Procedure and Administration Regulations (26 CFR Part 301) relating to the abatement of interest attributable to unreasonable errors or delays by an officer or employee of the IRS under section 6404(e)(1) of the Internal Revenue Code. Section 6404(e)(1) was enacted by section 1563(a) of the Tax Reform Act of 1986 (Public Law 99-514, 100 Stat. 2762 (1986)) (1986 Act) and amended by section 301 of the Taxpayer Bill of Rights 2 (Public Law 104-168, 110 Stat. 1452 (1996)) (TBOR2).

As enacted by the 1986 Act, section 6404(e)(1) provided that the IRS may abate interest attributable to any error or delay by an officer or employee of the IRS (acting in an official capacity) in performing a ministerial act. The legislative history accompanying the Act provided,

The committee intends that the term 'ministerial act' be limited to nondiscretionary acts where all of the preliminary prerequisites, such as conferencing and review by supervisors, have taken place. Thus, a ministerial act is a procedural action, not a decision in a substantive area of tax law.

H.R. Rep. No. 426, 99th Cong., 1st Sess. 845 (1985); S. Rep. No. 313, 99th Cong., 2d Sess. 209 (1986).

Further, Congress did not intend that the abatement of interest provision "be used routinely to avoid payment of interest." H.R. Rep. No. 426, 99th Cong., 1st Sess. 844 (1985); S. Rep. No. 313, 99th Cong., 2d Sess. 208 (1986). Rather, Congress intended abatement of interest to be used in instances "where failure to abate interest would be widely perceived as grossly unfair." *Id.*

On August 13, 1987, the IRS published temporary regulations (TD 8150) in the **Federal Register** (52 FR 30162) relating to the definition of ministerial act for purposes of abatement of interest. A notice of proposed rulemaking (LR-34-87) cross-referencing the temporary regulations was also published in the **Federal Register** for the same day (52 FR 30177). No public hearing regarding these regulations was requested or held. In this document, the IRS is reproposing a modified version of the earlier notice of proposed rulemaking to incorporate changes made by TBOR2. Therefore, the earlier notice of proposed rulemaking is withdrawn.

The temporary regulations define ministerial act to mean a procedural or mechanical act that does not involve the exercise of judgment or discretion, and that occurs during the processing of a taxpayer's case after all prerequisites to the act, such as conferences and review by supervisors, have taken place. A decision concerning the proper application of federal tax law (or

other federal or state law) is not a ministerial act. The temporary regulations also provide five examples to illustrate the definition of ministerial act.

In TBOR2, Congress amended section 6404(e)(1) to permit the IRS to abate interest attributable to any unreasonable error or delay by an officer or employee of the IRS (acting in an official capacity) in performing a managerial act as well as a ministerial act. Thus, as a result of TBOR2, the IRS has the authority to abate interest in more situations than under prior law.

Pursuant to the legislative history accompanying TBOR2, a managerial act is a loss of records or a personnel management decision such as the decision to approve a personnel transfer, extended leave, or extended training. See H.R. Rep. No. 506, 104th Cong., 2d Sess. 27 (1996). TBOR2 distinguished a managerial act from a general administrative decision, such as a decision on how to organize the processing of tax returns or a decision regarding the implementation of an improved computer system. *Id.* A general administrative decision is a decision that impacts tax administration. The amendments to section 6404(e)(1) are effective for interest accruing with respect to deficiencies or payments for taxable years beginning after July 30, 1996.

TBOR2 also added section 6404(g). Section 6404(g) grants the Tax Court jurisdiction to determine whether the IRS's failure to abate interest for an eligible taxpayer is an abuse of discretion. Tax Court review is available for requests for

abatement of interest that are made after July 30, 1996, or that have not been denied prior to July 31, 1996. See Banat v. Commissioner, 109 T.C. 92 (1997); White v. Commissioner, 109 T.C. 96 (1997).

Explanation of Provisions

TBOR2 expanded the scope of abatement relief under section 6404(e)(1). Consistent with congressional intent, the proposed regulations permit abatement of interest in more situations than under prior law. Nothing in the proposed regulations is intended to limit the extent to which the IRS could abate interest before the effective date of TBOR2.

The proposed regulations define managerial act and incorporate other changes made by TBOR2. TBOR2 did not alter the definition of ministerial act under prior law. Accordingly, the proposed regulations retain the definition of ministerial act in the temporary regulations.

Managerial act is defined as an administrative act that occurs during the processing of a taxpayer's case involving the temporary or permanent loss of records or the exercise of judgment or discretion relating to management of personnel. A decision concerning the proper application of federal tax law (or other federal or state law) is not a managerial act. Further, interest attributable to a general administrative decision, such as the IRS's decision on how to organize the processing of tax returns or its delay in implementing an improved computer system, cannot be abated under section 6404(e)(1).

In addition, the proposed regulations provide examples to illustrate the definitions of ministerial act and managerial act. Examples 1, 2, 3, 7, and 8 of the proposed regulations are substantially similar to Examples 1 through 5 of the temporary regulations. However, in Example 3 of the proposed regulations (Example 4 of the temporary regulations), a decision to approve extended training is a managerial act, and in Example 8 of the proposed regulations (Example 5 of the temporary regulations) the type of work priority is specified.

The provisions of the regulations are proposed to apply to interest accruing with respect to deficiencies or payments of any tax described in section 6212(a) for taxable years beginning after July 30, 1996.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. Chapter 5) does not apply to these regulations, and because the regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. Chapter 6) does not apply. Pursuant to section 7805(f) of the Internal Revenue Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Requests for a Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. All comments will be available for public inspection and copying. A public hearing may be scheduled if requested in writing by any person that timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place of the hearing will be published in the **Federal Register**.

Drafting Information

The principal author of these regulations is David B. Auclair. However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 301 is proposed to be amended as follows:

PART 301--PROCEDURE AND ADMINISTRATION

Paragraph 1. The authority citation for part 301 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 301.6404-2 is added to read as follows:

§301.6404-2 Abatement of interest.

(a) In general. (1) Section 6404(e)(1) provides that the Commissioner may (in the Commissioner's discretion) abate the assessment of all or any part of interest on any--

(i) Deficiency (as defined in section 6211(a), relating to income, estate, gift, generation-skipping, and certain excise taxes) attributable in whole or in part to any unreasonable error or delay by an officer or employee of the Internal Revenue Service (IRS) (acting in an official capacity) in performing a ministerial or managerial act; or

(ii) Payment of any tax described in section 6212(a) (relating to income, estate, gift, generation-skipping, and certain excise taxes) to the extent that any error or delay in payment is attributable to an officer or employee of the IRS (acting in an official capacity) being unreasonably erroneous or dilatory in performing a ministerial or managerial act.

(2) An error or delay in performing a ministerial or managerial act will be taken into account only if no significant

aspect of the error or delay is attributable to the taxpayer involved or to a person related to the taxpayer within the meaning of section 267(b) or section 707(b)(1). Moreover, an error or delay in performing a ministerial or managerial act will be taken into account only if it occurs after the IRS has contacted the taxpayer in writing with respect to the deficiency or payment. For purposes of this paragraph (a)(2), no significant aspect of the error or delay is attributable to the taxpayer merely because the taxpayer consents to extend the period of limitations.

(b) Definitions. (1) Managerial act means an administrative act that occurs during the processing of a taxpayer's case involving the temporary or permanent loss of records or the exercise of judgment or discretion relating to management of personnel. A decision concerning the proper application of federal tax law (or other federal or state law) is not a managerial act. Further, interest attributable to a general administrative decision, such as the IRS's decision on how to organize the processing of tax returns or the IRS's decision on the implementation schedule for an improved computer system, cannot be abated under paragraph (a) of this section.

(2) Ministerial act means a procedural or mechanical act that does not involve the exercise of judgment or discretion, and that occurs during the processing of a taxpayer's case after all prerequisites to the act, such as conferences and review by supervisors, have taken place. A decision concerning the proper

application of federal tax law (or other federal or state law) is not a ministerial act.

(c) Examples. The following examples illustrate the provisions of paragraphs (b)(1) and (b)(2) of this section. For the purposes of the examples, no significant aspect of any error or delay is attributable to the taxpayer, and the IRS has contacted the taxpayer in writing with respect to the deficiency.

Example 1. A taxpayer moves from one state to another before the IRS selects the taxpayer's income tax return for examination. A letter explaining that the return has been selected for examination is sent to the taxpayer's old address and then forwarded to the new address. The taxpayer timely responds, asking that the audit be transferred to the IRS's district office that is nearest the new address. The group manager approves the request. After the request for transfer has been approved, the transfer of the case is a ministerial act. The Commissioner may (in the Commissioner's discretion) abate interest attributable to any unreasonable delay in transferring the case.

Example 2. An examination of a taxpayer's income tax return reveals a deficiency with respect to which a notice of deficiency will be issued. The taxpayer and the IRS identify all agreed and unagreed issues, the notice is prepared and reviewed (including review by District Counsel, if necessary) and any other relevant prerequisites are completed. The issuance of the notice of deficiency is a ministerial act. The Commissioner may (in the Commissioner's discretion) abate interest attributable to any unreasonable delay in issuing the notice.

Example 3. A revenue agent is sent to a training course for an extended period of time, and the agent's supervisor decides not to reassign the agent's cases. During the training course, no work is done on the cases assigned to the agent. The decision to send the revenue agent to the training course and the decision not to reassign the agent's cases are not ministerial acts; however, both decisions are managerial acts. The Commissioner may (in the Commissioner's discretion) abate interest attributable to any unreasonable delay resulting from these decisions.

Example 4. A taxpayer appears for an office audit and submits all necessary documentation and information. The auditor tells the taxpayer that the taxpayer will receive a copy of the audit report. However, before the report is prepared, the

auditor is permanently reassigned to another group. An extended period of time passes before the auditor's cases are reassigned. The decision to reassign the auditor and the decision not to reassign the auditor's cases are not ministerial acts; however, they are managerial acts. The Commissioner may (in the Commissioner's discretion) abate interest attributable to any unreasonable delay resulting from these decisions.

Example 5. A taxpayer is notified that the IRS intends to audit the taxpayer's income tax return. The agent assigned to the case is granted sick leave for an extended period of time and the taxpayer's case is not reassigned. The decision to grant sick leave and the decision not to reassign the taxpayer's case to another agent are not ministerial acts; however, they are managerial acts. The Commissioner may (in the Commissioner's discretion) abate interest attributable to any unreasonable delay caused by these decisions.

Example 6. A revenue agent has completed an examination of the income tax return of a taxpayer. There are issues that are not agreed upon between the taxpayer and the IRS. Before the notice of deficiency is prepared and reviewed, a clerical employee misplaces the taxpayer's case file. The act of misplacing the case file is a managerial act. The Commissioner may (in the Commissioner's discretion) abate interest attributable to any unreasonable delay resulting from the file being misplaced.

Example 7. A taxpayer invests in a tax shelter and reports a loss from the tax shelter on the taxpayer's income tax return. IRS personnel conduct an extensive examination of the tax shelter, and the processing of the taxpayer's case is delayed because of that examination. The decision to delay the processing of the taxpayer's case until the completion of the examination of the tax shelter is a decision on how to organize the processing of tax returns. This is a general administrative decision. Consequently, interest attributable to this decision cannot be abated under paragraph (a) of this section.

Example 8. A taxpayer claims a loss on the taxpayer's income tax return and is notified that the IRS intends to examine the return. However, a decision is made not to commence the examination of the taxpayer's return until the processing of another return, for which the statute of limitations is about to expire, is completed. The decision on how to prioritize the processing of returns based on the expiration of the statute of limitations is a general administrative decision. Consequently, interest attributable to this decision cannot be abated under paragraph (a) of this section.

Example 9. During the examination of an income tax return, there is disagreement between the taxpayer and the revenue agent

regarding certain itemized deductions claimed by the taxpayer on the return. To resolve the issue, Examination requests advice from the Office of Chief Counsel on a substantive issue of federal tax law. The decision to request advice is a decision concerning the proper application of federal tax law; it is neither a ministerial nor a managerial act. Consequently, interest attributable to a delay resulting from the decision to request advice cannot be abated under paragraph (a) of this section.

Example 10. The facts are the same as in Example 9 except the attorney who is assigned to respond to the request for advice is granted leave for an extended period of time. The case is not reassigned during the attorney's absence. The decision to grant leave and the decision not to reassign the taxpayer's case to another attorney are not ministerial acts; however, they are managerial acts. The Commissioner may (in the Commissioner's discretion) abate interest attributable to any unreasonable delay caused by these decisions.

Example 11. A taxpayer contacts an IRS employee and requests the amount due to satisfy the taxpayer's income tax liability for a particular taxable year. Because the employee fails to access the most recent data, the employee gives the taxpayer an incorrect amount due. As a result, the taxpayer pays less than the amount required to satisfy the tax liability. Accessing the most recent data is a ministerial act. The Commissioner may (in the Commissioner's discretion) abate interest attributable to any unreasonable error or delay arising from giving the taxpayer an incorrect amount due to satisfy the taxpayer's income tax liability.

Example 12. A taxpayer contacts an IRS employee and requests the amount due to satisfy the taxpayer's income tax liability for a particular taxable year. To determine the current amount due, the employee must interpret complex provisions of federal tax law involving net operating loss carrybacks and foreign tax credits. Because the employee incorrectly interprets these provisions, the employee gives the taxpayer an incorrect amount due. As a result, the taxpayer pays less than the amount required to satisfy the tax liability. Interpreting federal tax law is neither a ministerial nor a managerial act. Consequently, interest attributable to an error or delay arising from giving the taxpayer an incorrect amount due to satisfy the taxpayer's income tax liability cannot be abated under paragraph (a) of this section.

(d) Effective date. The provisions of this section apply to interest accruing with respect to deficiencies or payments of any tax described in section 6212(a) for taxable years beginning after July 30, 1996.

/s/
Michael P. Dolan
Deputy Commissioner of Internal Revenue