

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

Number: **200915034**

Release Date: 4/10/2009

CC:PA:03:EPBenson

POSTN-152120-08

UILC: 6404.06-09

date: March 05, 2009

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subject: Abatement After Expiration of Assessment Limitations Period and Refund Limitations Period

This Chief Counsel Advice responds to your request for assistance dated December 11, 2008. This advice may not be used or cited as precedent.

**ISSUES**

1. Whether the Service may abate an excessive assessment of unemployment tax and apply the overpaid amount to excess collections, where the taxpayer paid the excess assessment in full, but later provided proof that the assessment was excessive after the period of limitations for requesting a refund or credit has expired.
2. Whether the Service may abate an excessive assessment of unemployment tax and, refund or credit the appropriate portion of the overpaid amount, where the taxpayer paid only a portion of the excess assessment, but later provided proof the assessment was excessive within the period of limitations for requesting a refund or credit.

**CONCLUSIONS**

1. The Service may abate an excessive assessment of unemployment tax and apply the overpaid amount to excess collections in situations where the taxpayer paid the excess assessment in full and the period for requesting a refund or credit has expired.

2. The Service may abate an excessive assessment of unemployment tax, and refund or credit the appropriate portion of the overpaid amount, in situations where the taxpayer has paid a portion of the excess assessment and the period for requesting a refund or credit has not expired.

### FACTS

The Unemployment Tax Unit is examining Forms 940 filed by a number of taxpayers. In the cases under examination, the taxpayers did not provide proof that state unemployment taxes were timely paid. This failure resulted in an additional assessment of unemployment tax within the assessment limitation period. After the expiration of the assessment limitation period, the taxpayers provided proof that state unemployment taxes were paid. This information rendered the unemployment tax assessments against the taxpayer excessive.

#### First scenario:

- The entire additional assessment is excessive.
- The taxpayer paid the entire unemployment tax liability, including the additional assessment, in full.
- The period within which to seek a refund or credit has expired.

#### Second scenario:

- The entire additional assessment is excessive.
- A portion of the additional assessment has not been paid.
- The period within which to seek a refund or credit has not expired.

### LAW AND ANALYSIS

Section 6404(a)(1) allows the Service to abate the unpaid portion of assessments that are excessive in amount. However, in stating that “[t]he Secretary is authorized to abate,” the statute uses permissive language. Thus the authority to abate extends over any assessment, including, but not limited to, the unpaid portion of the assessment. Treas. Reg. § 301.6404-1(a); cf. Poretto v. Ustry, 295 F.2d 499, 501 (5th Cir. 1961) (stating that it is the permissive language of section 6404 which allows for the provisions found in the Treasury Regulation under section 6404). In general, an abatement “wipes out the assessment” and if the Service decides to reimpose an abated assessment, it must make the new assessment within the statutory limitations period. In the Matter of Bugge, 99 F.3d 740, 744 (5th Cir. 1996). Neither section 6404 nor the regulations contains a statute of limitations on the abatement of a tax. However, if the taxpayer seeks a refund of the paid portion of an abated assessment, the taxpayer must make that request within the period of limitations provided by section 6511.

In both the first and second scenario, the Service may abate the excessive assessment. Treasury Regulation § 301.6404-1(a) states, “the district director or the director of the

regional service center may abate any assessment, or unpaid portion thereof, if the assessment is in excess of the correct tax liability.” In both scenarios, there is no question that the assessment is in excess of the correct tax liability because the taxpayer has provided proof that state unemployment taxes were timely paid. Therefore, it is within the Service’s discretion to abate the assessment in these cases. Further, there is no period of limitations on the Service’s ability to make an abatement. Thus, the fact that the period within which to file a claim for refund or credit has expired has no effect on the Service’s authority to abate the assessment.

While an argument could be raised that the statute limits abatements to the unpaid portions of assessments, therefore preventing an abatement in cases such as those presented in scenario one or preventing abatement of the paid portions of the assessment in scenario two,<sup>1</sup> we do not believe that is what the statute intended. As discussed above, the language of section 6404(a) is permissive; that is, it allows the Service to abate unpaid portions of assessments. It does not prevent the Service from abating the paid portions of assessments. The Fifth Circuit Court of Appeals, in holding that the decision to abate was discretionary and not mandatory, found that the regulation under section 6404, including the language allowing the abatement of “any assessment,” was permitted due to the permissive language of section 6404. Poretto, 295 F.2d at 501. Thus, there is no legal barrier to the Service following the broader language of the regulation, rather than the narrower language of the statute. Moreover, following the narrow language of the statute would lead to nonsensical results. For example, under this interpretation, the Service could not abate an assessment after receiving full payment of the tax. This would mean that the Service could not affect an overpayment allowing a refund in cases where the refund period has not expired. Congress could not have intended this result. Therefore, the Service has the authority to abate paid portions of assessments.

The fact that the period of limitations for assessment has expired in both scenarios one and two would not bar the Service from abating the excess assessments. As long as the initial assessments were made within the proper period, nothing in section 6404 or the regulations prevents the Service from exercising its abatement authority after the assessment limitation period has expired. However, the Service cannot reassess an abated liability unless it does so within the applicable statute of limitations. Gray v. Commissioner, 104 F.3d 1226, 1228 (10th Cir. 1997). Since the statute of limitations on assessment has run in both the scenario one and two cases, the Service would be unable to reassess in these cases if it abates the current assessments. Therefore, the Service should take great care before abating the assessments in these cases because it may not be able to reassess.

Though the Service may abate the excess assessment in scenario one, the Service may not refund or credit the excess payment. In the scenario one cases, the period of

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<sup>1</sup> There would appear to be no question that the unpaid portions of the assessment in scenario two cases could be abated.

time for filing a claim for refund or credit has expired. This period may not be tolled for nonstatutory equitable reasons. U.S. v. Brockamp, 519 U.S. 347, 348 (1997). Thus, even though the Service may abate the assessment, it may not refund or credit the amount to the taxpayer. I.R.C. § 6511(b)(1). If an overpayment is barred from being refunded, it should be applied to the Excess Collections File. I.R.M. 4.13.3.13(1)(c). In the scenario two cases, where the period within which to claim a refund or credit has not expired, the taxpayer could file a claim for a refund or credit for the overpayment.

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