

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

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subject: Invalid abatement of assessment based on amended return

This document should not be used or cited as precedent.

Date A =

Date B =

Date C =

Date D =

Tax Year 1 =

Tax Year 2 =

Amount A =

Amount B =

Amount C =

Amount D =

Amount E =

Amount F =

Amount G =

This memorandum responds to your request for advice based on the following facts.  
On Date A, the taxpayer and his wife ("the taxpayers"), filed their joint Individual Income

Tax Form 1040 for Tax Year 2 reporting a liability of Amount A. On Date B, the Service assessed the tax shown on the return. The liability was satisfied by Amount B of withholding, an Amount C overpayment credit from Tax Year 1, and a payment of Amount D included with the Tax Year 2 return.

On Date C, the taxpayers submitted a Form 1040X for Tax Year 2 reporting a liability of Amount E. On Date D, after processing the amended return, the Service abated the Date B assessment using the transaction code TC 291 and input the refund code TC 846. On that same date, the Service cancelled the refund using the transaction code TC 841. More than three years after the original Form 1040 was filed, the Service subsequently examined the amended return and determined the taxpayers' proper tax liability for Tax Year 2 was Amount F.

### ISSUES

1. Was the abatement an "erroneous abatement" due to a clerical error such that that the Date B assessment could be reinstated?
2. Is the limitation period for making a new assessment against the taxpayers still open?
3. If the Service cannot assess the corrected tax liability, must the Service refund the amounts paid?

### CONCLUSIONS

1. The abatement was not an "erroneous abatement," and therefore, the Date B assessment cannot be reinstated.
2. No. The general three-year period of limitations for assessment began on the date the original return was filed and has subsequently expired.
3. The Service may retain the amount of the corrected tax liability paid prior to expiration of the assessment limitation statute, and must refund the balance to the taxpayers.

### DISCUSSION

#### 1. Erroneous Abatement

Section 6404 authorizes the Service to abate the unpaid portion of the assessment of any tax or any liability in respect thereof, which is (1) excessive in amount; (2) assessed after the expiration of the period of limitations properly applicable thereto; or (3) erroneously or illegally assessed. Generally, when an assessment is abated, it is canceled and cannot be reinstated if the Service later decides that a liability should not have been abated. Crompton-Richmond Co. v. United States, 311 F. Supp. 1184, 1186

(S.D.N.Y. 1970). Instead, the Service must make a new assessment. An abatement can be reversed, however, under the clerical error doctrine. In re Becker, 407 F.3d 89, 100-01 (2nd Cir. 2005); United States v. Cooper, 83-1 USTC 9266 (D.D.C. 1983). In Crompton-Richmond Co., the court differentiated an abatement based upon a substantive reconsideration of the taxpayer's liability from an abatement based upon mistake of fact or a bookkeeping error. Crompton-Richmond Co., 311 F. Supp. at 1187. The Service is precluded from cancelling an abatement and reinstating an assessment when the abatement is based upon a substantive reconsideration of the taxpayer's liability. Id. If the abatement is based on an administrative error, however, the court ruled that the abatement can be reversed as long as the taxpayer is not prejudiced. Id. Because a clerical mistake does not fall within the provisions of sections 6404(a)(1) through (3), the abatement is a nullity and the original assessment remains valid.

Pursuant to this case law, the Internal Revenue Manual ("IRM") permits reversal of an abatement made as a result of a clerical error, such as a keypunch error or the misreading of input documents, where the taxpayer is not prejudiced by the error. But where an abatement is made after a "substantive redetermination of a tax liability," the abatement cannot be reversed but instead the assessment must be reassessed under the normal assessment procedures. The IRM provides that "[a]n abatement/tax decrease request made in response to an amended return always constitutes a redetermination of tax even if the Service makes only a hasty review of the return before making the abatement." IRM 25.6.1.10.2.4 (2).

In the present case, the abatement was made in response to an amended return, and therefore constitutes a substantive reconsideration of the taxpayers' liability. Because there was a substantive reconsideration of the taxpayers' liability, the Service is precluded from cancelling the abatement and reinstating the Date B assessment.

## 2. Period of Limitations for Assessment

The Service generally must assess a tax within three years after the filing of the return. I.R.C. § 6501(a). This period of limitations for assessment begins on the due date of the return if the return is filed prior to the due date, or on the actual filing date of the return if the return is filed after the due date. I.R.C. § 6501(a), (b)(1). The filing of an amended return after the due date of the original return does not serve to extend the period within which the Service may assess a deficiency. See Badaracco v. Commissioner, 464 U.S. 386, 393 n.8 (1984); Zellerbach Paper Co. v. Helvering, 293 U.S. 172 (1934); National Paper Products Co. v. Helvering, 293 U.S. 183 (1934); Insulglass Corp. v. Commissioner, 84 T.C. 203, 207 (1985). In the present case, the taxpayers' amended return was filed well after the due date (including extensions) of the original return, therefore the period of limitations for assessment began on the date the taxpayers filed their original return.

Section 6501(e), however, provides an exception to the general three-year period of limitations. Under section 6501(e), if a taxpayer omits from gross income an amount in

excess of 25 percent of the amount of gross income reported on the return, the period of limitations for assessment is six years from the date the return was filed. The word “return” in section 6501(e)(1)(A), does not include amended returns filed after the due date of the original return. See Chin v. Commissioner, T.C. Memo. 1994-54; Houston v. Commissioner, 38 T.C. 486, 489-90 (1962) (interpreting similar language in section 275(c), the predecessor to section 6501(e)); Goldring v. Commissioner, 20 T.C. 79, 81 (1953) (same). In this case, the taxpayers’ amended return was filed after the due date (including extensions) of the original return, therefore it did not incorporate any omissions on the amended return into the original return for purposes of section 6501(e)(1)(A).<sup>1</sup> Because the exception provided in section 6501(e)(1)(A) does not apply and the period of limitations, which began to run with the filing of the original return, has expired, the Service is barred from assessing the corrected tax liability. See Chin, T.C. Memo. 1994-54; Insulglass Corp, 84 T.C. at 207; Goldring, 20 T.C. at 82; see also Badaracco, 464 U.S. 386.

### 3. Entitlement to a Refund

Section 6402(a) authorizes the Service to make a refund of the amount of an overpayment made by a taxpayer. An overpayment includes any payments assessed or collected after the limitations period for assessment has run. I.R.C. § 6401(a). The definition of “overpayment” provided in section 6401(a), however, is not comprehensive. “The term ‘overpayment’ has been interpreted to mean ‘any payment in excess of that which is properly due.’” Bachner v. Commissioner, 109 T.C. at 128 (citing Jones v. Liberty Glass Co., 332 U.S. 524, 531 (1947)).

If unassessed taxes are properly due and voluntarily paid *before* the expiration of the limitations period for assessment, the payment is not an overpayment. See Lewis v. Reynolds, 284 U.S. 281, 283 (1932); Principal Life Ins. Co. v. United States, 95 Fed. Cl. 786, 806 (Fed. Cl. 2010). While the expiration of the period of limitations bars the assessment and collection of any additional taxes not already paid, it does not prevent the Service from retaining payments received before the expiration date when the payments do not exceed the amount that is properly due. Lewis, 284 U.S. at 283; Principal Life Ins., 95 Fed. Cl. at 806 (“the failure to assess a tax timely impacts the ability of the [Service] to pursue the unpaid amount, it does not prevent the [Service] from retaining an amount paid with respect to that tax liability prior to expiration of the limitations period”).

In the present case, the Service received the withheld amount, credit and voluntary payment from the taxpayers well before the expiration of the three-year period of limitations for assessment. Therefore, the amount of the payment which is not in excess of the proper tax liability, Amount F, does not constitute an overpayment and

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<sup>1</sup> An amended return that is filed late, after the due date of the original return (including extensions), is a nullity for purposes of the statute of limitations on assessment, and does not incorporate anything into the original return. See Badaracco, 464 U.S. 386; WM. B. Scaife & Sons Co. v. Commissioner, 117 F.2d 572 (3d Cir. 1941).

may be retained by the Service. Pursuant to the CCDM, this amount should be accounted for by transferring it to the Excess Collection File. CCDM 25.6.1.10.2.4.3 (2). See this CCDM provision for more information regarding the remaining actions that must be taken in handling the taxpayers' account, including the preparation of the barred assessment report.

The amount of the payment which is in excess of the proper tax liability, however, should be refunded to the taxpayer because this amount constitutes an overpayment. See Principal Life Ins., 95 Fed. Cl. at 807 n.43 (stating that the Supreme Court has defined "overpayment" as "any payment in excess of that which is properly due") (citing Jones, 332 U.S. at 531). Therefore, the taxpayers are due a refund of Amount G, which is the amount of the payment in excess of the taxpayers' proper tax liability. Furthermore, the taxpayers' claim for refund is timely because the amended return was filed on within three years from the date their original return was filed. See § 6511(a)(claim for refund or credit must be filed within 3 years from the date the original return was filed or 2 years from the time the tax was paid, whichever expires later).

Please call (202) 622-3630 if you have any further questions.

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