

Department  
of the  
Treasury

Internal  
Revenue  
Service

Office of  
Chief Counsel

# Notice

CC-2011-020

September 15, 2011

**Subject:** Reversal of Unauthorized Abatements Following Referral to the Department of Justice

**Cancel Date:** Upon incorporation into the CCDM

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## Purpose

This Notice provides guidance on correcting assessment records when taxes are abated in error by the Internal Revenue Service following referral to the Department of Justice.

## Background

The Service sometimes erroneously abates assessments for taxes that have been referred to Justice for collection. For example, in United States v. Pound, 2010 WL 2803918 (E.D. Okla. 2010), after the taxpayer's assessed tax liabilities were reduced to judgment by Justice, the Service fully abated the tax liabilities in disregard of the litigation freeze codes in place on the taxpayer's accounts and without consulting Counsel or Justice.<sup>1</sup> The district court granted the taxpayer's motion to vacate the judgment on the ground that the tax assessments were abated, rejecting the Government's argument that the abatements were made in error and could be reversed.

For the reasons discussed below, we disagree with the court's holding in Pound that, under these circumstances, the abatement cannot be reversed and the Service's transcripts cannot be corrected to reflect the existence of the original assessment. A post-referral abatement made without approval by Justice is void and the abatement should be reversed and the Service's transcript records corrected.

## Discussion

Section 6404(a) provides the Service with the authority to abate an assessment of tax that is (1) excessive in amount; (2) assessed after the expiration of period of limitations properly applicable

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<sup>1</sup> After a case has been referred to Justice, a litigation freeze code, "TC 520," is placed on the taxpayer's account to prevent the Service from taking any unauthorized action on the account. See IRM 21.5.6.4.45 (07-21-2010) -W Freeze. When a freeze code is in place on the account, Service personnel are instructed to take no action on the account without first contacting the "litigation contact" and getting appropriate authorization. The litigation contact is responsible for contacting any other necessary parties, including Justice attorneys handling the litigation.

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thereto; or (3) erroneously or illegally assessed. In general, when an assessment is abated by the Service, the abatement cannot be reversed if the Service later decides that the abatement was incorrect. Crompton-Richmond Co. v. United States, 311 F. Supp. 1184, 1186 (S.D.N.Y. 1970). Instead, the Service must make a new assessment, assuming the statute of limitations for assessment is still open. Id.

The rule against reversing the abatement may not apply when the abatement is not made pursuant to section 6404(a). For example, the judicially-created clerical error doctrine provides authority for reversal of an abatement of the original assessment in limited circumstances. Crompton-Richmond Co., 311 F.Supp. at 1186; In re Becker, 407 F.3d 89, 99-101 (2nd Cir. 2005); Bugge v. United States, 99 F.3d 740, 745 (5th Cir. 1996). Under the clerical error doctrine, an abatement that occurs as the result of a mistake of fact or bookkeeping error may be reversed if there is no prejudice to the taxpayer. The doctrine rests on the theory that the abatement was not made pursuant to section 6404(a) and is a nullity. Under the doctrine, the original assessment is re-instated and, therefore, remains valid. Crompton-Richmond Co., 311 F.Supp. at 1186-87.

Abatement of tax for a tax period referred to Justice that is made without the approval of Justice is invalid and may be reversed, because the Service lacks the authority to take such action on the taxpayer's account without Justice approval. The conduct and control of all federal tax litigation, except in the Tax Court, is vested in the Department of Justice. 28 U.S.C. §§ 515-519. Section 5 of Executive Order 6166, reprinted in 5 U.S.C. § 901, provides, "As to any case referred to the Department of Justice for prosecution or defense in the courts, the function of the decision whether and in what manner to prosecute, or to defend, or to compromise, or to appeal, or to abandon prosecution or defense, now exercised by any agency or officer, is transferred to the Department of Justice." In addition to Title 28 and the Executive Order, section 7122(a) gives the Attorney General the exclusive authority to compromise a case arising under the Internal Revenue Code after referral to Justice for prosecution or defense.

Following the referral of a case, Justice has the exclusive authority to make and approve adjustments to the referred tax liabilities. Any abatement made by the Service in order to adjust a referred tax liability must be authorized by Justice or it will be void. Because the post-referral abatement is void, it is not necessary to reassess. In order that the Service's transcripts reflect correctly the existing assessment, the post-referral abatement must be reversed and the transcripts of the taxpayer's tax accounts corrected.<sup>2</sup>

For these purposes, a referral to Justice is considered to be in effect with respect to any tax liability once a letter from the Service is sent to Justice requesting the institution of a civil action to collect or recover taxes and providing the authorization required under section 7401, or requesting Justice to defend the Service in a suit brought against the Service. See CCDM

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<sup>2</sup> Given the limitations of the Service's systems, in order to reverse a post-referral abatement, the Service must use the same procedures used to reverse a clerical error abatement. See IRM 25.6.1.10.2.4 (10-01-2007) Erroneous Abatement; IRM 3.17.243.2 (10-01-2009) Reversal of Erroneous Abatements. If the reversal of the abatement is made while the assessment statute of limitations is open, the reversal is accomplished through the Master File by the entry of a Transaction Code 290. The TC 290 is used because the system does not have a transaction code for abatement reversal. Although the TC 290 is labeled as a "quick assessment" on the transcript and is dated as of the date it is input, this is merely the procedure used to ensure that the Service's records again reflect the original assessment. If the abatement is reversed after the statute of limitations on assessment has closed, a NonMaster File account must be created to ensure that the Service's records again reflect the original assessment.

