DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OFFICE OF
CHIEF COUNSEL

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MEMORANDUM FOR DISTRICT COUNSEL,

FROM: PAMELA W. FULLER
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(ADMINISTRATIVE PROVISIONS & JUDICIAL PRACTICE)

SUBJECT: REQUEST FOR ABATEMENT OF PENALTIES
WTA-N-109926-00

This is in response to your memorandum dated April 21, 2000.

ISSUE

Whether the hazards of litigation are such that penalties should be abated, under section 6404, under the facts as described below.

CONCLUSION

[redacted]

FACTS

The District recently conducted an investigation involving numerous abatement of penalty requests proposed by the same revenue officer and approved by the group manager. This review revealed that the abatements proposed by the revenue officer were improper because the revenue officer did not follow the manual guidelines and promised penalty abatements where no reasonable cause appears to exist to justify the abatements. In two of the five described cases, it appears

that the revenue officer sent to the taxpayer a written statement indicating that if the taxpayer paid the tax liability the revenue officer would abate the penalties. In three of the five described cases, it appears that the taxpayer entered into an installment agreement where the monthly payment was insufficient to cover the tax liability and penalties.

Following the Service's investigation, the penalty abatements were not made, and the accounts were returned to the field for collection. Several taxpayer representatives are threatening legal action because the revenue officer had promised that full payment of the tax would result in the abatement of all penalties and the Service is not honoring these written assurances. The District would like to know whether there are any legal grounds to abate the penalties.

LAW AND ANALYSIS

Section 6404(f)

Section 6404(f) of the Code provides that the Service will abate any portion of any penalty or addition to tax attributable to erroneous advice furnished to the taxpayer in writing by an officer or employee of the Service if (1) the written advice is reasonably relied upon by the taxpayer and was in response of a specific written request of the taxpayer, and (2) the portion of the penalty or addition to tax did not result from a failure by the taxpayer to provide adequate or accurate information.

Under section 301.6404-3(e)(1) of the Procedure and Administration Regulations, written advice will be considered advice for section 6404(f) abatement only if the response applies the tax laws to the specific facts submitted in writing by the taxpayer and provides a conclusion regarding the tax treatment to be accorded the taxpayer upon the application of the tax law to those facts.

Section 301.6404-3(b)(3) of the regulations provides that no abatement will be allowed unless the penalty or addition to tax is attributable to advice issued in response to a specific written request for advice by the taxpayer. For advice unrelated to an item on a tax return, the taxpayer is not considered to have reasonably relied upon the advice if the taxpayer received the advice after the act or omission that is the basis for the penalty or addition to tax. § 301.6404-3(b)(2)(iv).

Section 6404(a)

Section 6404(a) provides that the Service is authorized to abate the unpaid portion of the assessment of any tax, or any liability in respect thereof, which is in excess of the correct tax liability, if the assessment is made subsequent to the expiration of the

applicable period of limitations, or if the assessment has been erroneously or illegally made. An assessment is excessive in amount where the tax liability is computed by relying on an invalid legal theory. In re Burns, 974 F.2d 1064, 1066 (9th Cir. 1992). An assessment is erroneous where the assessment is without any rational foundation. See United States v. Janis, 428 U.S. 433, 441 (1976).

Section 301.6404-1(a) of the regulations delegates this abatement authority to the District Director or the Service Center Director.

Equitable Estoppel

Equitable estoppel prevents the Service from taking a position inconsistent with an earlier representation by the Service. The following elements must be shown before equitable estoppel will be applied against the Service: (1) a false representation or wrongful misleading silence by the Service; (2) error in a statement of fact and not in an opinion or statement of law; (3) ignorance of the true facts; (4) reasonable reliance on the acts or statements by the taxpayer; and (5) a resulting detriment to the taxpayer relying on the false statement or misleading silence. Fredericks v. Commissioner, 126 F.3d 433, 438 (3d Cir. 1997).

Generally, courts have held that a private party's reliance on government actions or omissions is not reasonable if such acts or omissions are contrary to the law or beyond the agents' authority. See Miller v. United States, 949 F.2d 708 (4th Cir. 1991); see also, Ritter v. United States, 28 F.2d 265 (3d Cir. 1928); Goldberg v. Weinberger, 546 F.2d 477, 481 (2d Cir. 1976). Courts have specifically held that a revenue agent does not have the authority to bind the Commissioner, and consequently, a claim of estoppel is usually rejected, even though a taxpayer contends that he followed the erroneous advice of an agent and acted in reliance upon it. Miller, 949 F.2d at 712; Boulez v. Commissioner, 76 T.C. 209 (1981); Hodel v. Commissioner, 72 T.C.M. (CCH) 276 (1996). Furthermore, courts expressly have prohibited the application of the doctrine of equitable estoppel in cases involving the Service. See Miller, 949 F.2d at 712 (holding that "neither the government, nor a government agency such as the IRS, can be equitably estopped from asserting its legal rights because of the actions of its agent"). However, other courts have held that a government agency may be estopped from disavowing a statement even though the misinformation provided by the government agency was unauthorized and incorrect. See Brandt v. Hickel, 427 F.2d 53 (9th Cir. 1970)(stating "not every form of official misinformation will be considered sufficient to estop the government. Yet some forms of erroneous advice are so closely connected to the basic fairness of the administrative decision making process that the government may be estopped from disavowing the misstatement").

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

The five cases involve written advice concerning penalties that do not relate to items on a tax return. The regulations provide that in such cases, the Service is not authorized to abate penalties where the written advice is received after the act or omission of the taxpayer that is the basis for the penalty because the taxpayer is not considered to have reasonably relied on the advice. § 301.6404-3(b)(2)(iv). In addition, the Service lacks the authority to abate because the cases do not involve advice that was written by the Service in response to a taxpayer's specific written request. § 301.6404-3(b)(3). Instead, the cases seem to involve informal discussions between the revenue agent and the taxpayers that were later documented by the revenue officer. Lastly, the cases also do not involve a written response that qualifies as advice because the written response received by the taxpayers did not apply the tax laws to specific facts submitted in writing by the taxpayer. For the foregoing reasons, section 6404(f) is inapplicable to the five described cases and does not provide the Service with the authority to abate the penalties. In the present case, however, if the District Director concludes that the assessment was excessive in amount or erroneously assessed, the District Director has the discretionary authority to abate the tax (or penalties) attributable to the assessments under section 6404(a).

Please call if you have further questions.