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Office of Chief Counsel
Internal Revenue Service

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memorandum

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to: District Counsel, South Texas District, CC:MSR:STX:AUS
Attn: Jerry L. Hamilton

from: Assistant Chief Counsel (Income Tax & Accounting), CC:DOM:IT&A:3

subject: Request for Significant Service Center Advice:
Requests for Abatement of Math Error Assessments

This responds to your request for Significant Advice, dated November 12, 1997, in connection with questions posed by the Austin Service Center.

Disclosure Statement

Unless specifically marked "Acknowledged Significant Advice, May Be Disseminated" above, this memorandum is not to be circulated or disseminated except as provided in CCDM (35)2(13)3:4(d) and (35)2(13)4:(1)(e). This document may contain confidential information subject to the attorney-client and deliberative process privileges. Therefore, this document shall not be disclosed beyond the office or individual(s) who originated the question discussed herein and are working the matter with the requisite "need to know." In no event shall it be disclosed to taxpayers or their representatives.

Issue

The Service Center wishes to clarify the manner in which a taxpayer may request abatement of the assessment of a mathematical or clerical error, under § 6213(b)(2)(A) of the Internal Revenue Code.

Conclusions

We agree that a request for abatement of a "math error" assessment does not have to be in writing. Although, under the statute, it must be "filed," this may be accomplished by an oral statement over the telephone or through other electronic means, so long as procedures are followed to ensure proper recording of the request. If the matter is handled through telephone contact, the Service cannot require a written abatement request.

We also agree that a taxpayer's decision not to request abatement of a math error assessment is a waiver of the taxpayer's procedural rights, including the statutory right to contest the adjustment in the Tax Court. Consistent with the intent of Congress, both as to taxpayer rights in general and the math error procedure in particular, a taxpayer need not demand or insist that an adjustment be abated, search for "magic words" (for example, "I request abatement"), or provide reasons for the disagreement. All that is required is a request, and a timely request must be honored. If there is doubt, it should be resolved in favor of abatement.

In order to (1) assure that a taxpayer makes a knowing, voluntary waiver of the taxpayer's rights; (2) avoid the need for subjective evaluations of the level of (or justification for) a taxpayer's disagreement; (3) eliminate the necessity for the use of "magic words"; and (4) ensure uniform treatment of taxpayers nationwide -- particularly when the adjustment is being handled over the telephone -- the Service should, as standard practice, explain the taxpayer's options and ask for the taxpayer's agreement or disagreement with the adjustment. Thus, when asked, "Do you wish to request abatement?", the minimum a taxpayer must do to obtain abatement is to say, "Yes."

Typical Fact Pattern

A taxpayer files a return. The Service determines that the return contains a mathematical or clerical error, as defined in § 6213(g). The Service summarily assesses the resulting tax, as permitted by § 6213(b)(1), and sends the taxpayer a notice explaining that the return has been changed. Within the 60-day period provided in § 6213(b)(2), the taxpayer responds. The taxpayer cannot provide "substantiation" (for example, a correct taxpayer identification number), or otherwise convince the Service representative that the adjustment is incorrect; however, the taxpayer does not agree with the adjustment.

Discussion

Background

Section 6213(b) provides that the restrictions on assessment and collection in § 6213(a) do not apply to mathematical and clerical errors, as defined in § 6213(g)(2).¹ Instead, when a

¹ The Service's math error authority was recently expanded to cover several situations involving the earned income credit (EIC) and missing or incorrect taxpayer identification numbers (TINs). See § 6213(g)(2)(F) - (J).

"math error" is found, summary assessment is allowed. Following the assessment, the taxpayer is sent a notice concerning the math error assessment. As the notice explains, the taxpayer has 60 days to request abatement of the assessment.

The right to abatement is statutory. Section 6213(b)(2)(A) provides:

Notwithstanding section 6404(b) [which generally prohibits claims for abatement], a taxpayer may file with the Secretary within 60 days after [a math error notice is sent] a request for an abatement of any assessment specified in such notice, and upon receipt of such request, the Secretary shall abate the assessment. Any reassessment of the tax with respect to which an abatement is made under this subparagraph shall be subject to the deficiency procedures

Collection is stayed during the 60-day period. § 6213(b)(2)(B).

Although an exception to the deficiency procedures for mathematical errors was first introduced in 1926, there is no notable legislative history until 1976, when two significant changes were made. First, Congress, ratifying Service practice, expanded the scope of the provision to include "clerical errors," listing the types of errors in some detail in § 6213(g). Second, taxpayers were given abatement rights, in a new § 6213(b)(2).²

The balance involved was explained in the 1976 "Bluebook":

Questions had been raised as to whether the Service had used its mathematical errors summary assessment powers in cases where their use was not authorized by the statute. The Service maintained that it properly used this procedure in categories of cases where most taxpayers did not dispute the Service's conclusions, thereby substantially reducing administrative and other costs.

The Service had stated that the deficiency notice procedure was significantly more costly than the mathematical error procedure, both in terms of personnel and processing costs and in terms of the cost to the Government of delays in collection of taxes. On the other hand, Congress has concluded that the Service should not be able to proceed summarily where it may have erred in its determination.

In balancing these considerations, Congress decided (1) to provide greater protection for taxpayers who wish to contest Internal Revenue Service summary assessments in mathematical error cases by restricting the Service's powers in such cases and (2) to clarify the kinds of cases in which the Service could use this restricted summary assessment authority.

² Prior to the 1976 amendments, taxpayers had no right to request abatement or receive judicial review prior to paying the tax. Service practice was to abate the assessment whenever the taxpayer could explain that there was, in fact, no error.

General Explanation of the Tax Reform Act of 1976 ("General Explanation"), 94th Cong., 2d Sess., 372-74 (1976); 1976-3 (Vol. 2) C.B. 1, 384-86. As the Senate Committee Report explained,

The amendment provides that where the Internal Revenue Service uses the summary assessment procedure for mathematical errors ... the taxpayer must be given an explanation of the asserted error ... , the taxpayer must be given a period of time during which he or she may require the Service to abate its assessment ... , and the Service is not to proceed to collect on the assessment until the taxpayer has agreed to the assessment or has allowed his or her time for objecting to expire

S. Rep. No. 938, 94th Cong., 2d Sess. 375 (1976); 1976-3 (Vol. 3) C.B. 49, 413.

Oral Abatement Requests

The statute and regulations do not specify either a written format or a signature for abatement requests. Contrast, for example, § 6501(c)(4), requiring a consent "in writing" to extend the statute of limitations. Section 6213(b)(2) provides that the taxpayer may "file" a request for abatement. However, items are "filed" other than in writing. For example, many taxpayers may use TeleFile to file their returns on Form 1040EZ, and the references to signatures and writing in § 6213(d) -- which requires that a waiver of restrictions on assessment and collection must be "a signed notice in writing filed with the Secretary" (emphasis added) -- would be superfluous if those requirements were implied in the term "filed."

Our understanding is that math error abatement requests have been, and continue to be, received largely through telephone contacts. These telephone procedures are less expensive for the Service to process and more convenient for the taxpayer than written correspondence procedures. As discussed further below, the ability of the taxpayer to request abatement freely and without undue restriction is consistent with the intent of the math error procedure. Thus, we are unaware of any technical or policy reasons to require written rather than telephone requests for abatement in cases of disagreement. In fact, it would be unduly restrictive for the Service to do so, given that -- unlike, for example, a § 6213(d) waiver, discussed above -- a taxpayer's agreement with a math error adjustment does not have to be in writing.

Nature of Abatement Request

As the legislative history quoted above indicates, the math error summary assessment procedure is intended to benefit the Service, "in categories of cases where most taxpayers [do] not dispute the Service's conclusions, thereby substantially reducing administrative and other costs." It is intended to resolve readily apparent errors, those adjustments with which taxpayers

rarely disagree.³ As opposed to other summary assessment procedures, such as the jeopardy procedure under § 6861, the math error procedure is premised on taxpayer agreement. If an issue is one as to which the taxpayer and the Service disagree, it should be handled through the deficiency procedures, which provide procedural safeguards for the taxpayer.

The taxpayer's access to the deficiency procedures is through request for abatement; any reassessment of the abated tax must occur through the deficiency procedures. § 6213(b)(2)(A). Thus, although it is not phrased as such in the statute, failure to request abatement is a waiver of the taxpayer's administrative and statutory rights, including the opportunity to take the dispute to Appeals and the right to petition the Tax Court.⁴ This was recognized in Publication 1, "Your Rights as a Taxpayer," as revised in 1990:

If we tell you that you owe tax because of a math or clerical error on your return, you have the right to ask us to send you a formal notice (a "notice of deficiency") so that you can dispute the tax You do not have to pay the additional tax at the same time that you ask us for the formal notice, if you ask for it within 60 days of the time we tell you of the error.⁵

Further, the Service has a duty to ensure, to the extent possible, that the taxpayer makes an informed decision to waive these rights.

³ See, for example, the discussion, in the 1976 legislative history, of the "inconsistent entry" type of error in § 6213(g)(2)(C): "This category is intended to encompass those cases where it is apparent which of the inconsistent entries on the returns is correct [T]his summary assessment procedure is not to be used where the Service is merely resolving an uncertainty against the taxpayer." General Explanation at 373; 1976-3 (Vol. 2) C.B. at 385.

⁴ Assuming the assessment was paid, the taxpayer would still have rights under the refund claim procedure.

⁵ Neither the current, shortened version of Publication 1, which cross-references to other publications for more detailed descriptions of taxpayers' rights, nor the referenced publications themselves (see, e.g., Publications 5, "Appeal rights and Preparation of Protests for Unagreed Cases"; 556, "Examination of Returns, Appeal Rights, and Claims for Refund"; and 594, "Understanding the Collection Process") describe the math error procedure. However, the description in the earlier version of Publication 1 remains accurate.

Clearly, such a duty is consistent with the Service's policy objectives.⁶ However, we believe that it also has legal underpinnings.

First, as a general matter, a waiver has been defined as a voluntary and intentional relinquishment of a known right, claim, or privilege. For a waiver to be effective, it must be clear that the waiving party had full knowledge of the right, benefit, or advantage in question, and intended to waive it. See 28 Am. Jur. 2d Estoppel & Waiver §§ 154, 158 (1966); 31 C.J.S. Estoppel § 61, Waiver at 1056 (1955).

Second, a practice of informing taxpayers of their abatement rights is consistent with the intent of Congress, as indicated in related legislative provisions and proposals. For example, § 6227 of the 1988 Taxpayer Bill of Rights ("TBOR 1") requires the Service to send an explanation of a taxpayer's rights "to all taxpayers the Secretary contacts with respect to the determination or collection of any tax (other than by providing tax forms)." See also H.R. 2676, Title III, Taxpayer Bill of Rights 3 ("TBOR 3"), § 345(a) (notice of right to refuse or limit extension of limitations period), § 352 (revision of Publication 1 regarding taxpayer rights in interviews), § 354 (inclusion of explanation of appeals and collection process with 30-day letter).

Third, as discussed above, such a practice is consistent with the legislative history behind § 6213(b)(1) itself. The 1976 Senate Committee Report specified that "the Service is not to proceed to collect on the assessment until the taxpayer has agreed to the assessment or has allowed his or her time for objecting to expire" (emphasis added).

Finally, a practice of informing taxpayers of their abatement rights conforms with other situations in which taxpayers face a decision to exercise or waive their rights under the deficiency procedures. For example, at the close of examinations, if taxpayers do not agree with the findings of the examiner, examiners are required by regulation to inform the taxpayers of their appeal rights. § 601.105(b)(4), (c). Taxpayers also receive a "30-day letter" informing them of their appeal rights and alternatives. § 601.105(c), (d). Similarly, if a notice of deficiency is issued, the notice explains the

⁶ Commissioner Rossotti recently stated, in a memorandum to all employees dated January 26, 1998:

As IRS employees, we are obligated to ensure that taxpayers receive all rights guaranteed to them by the Internal Revenue Code (IRC), including the two Taxpayer Bills of Rights (TBOR), and the additional internal procedures and policies we have adopted for their protection. ... Any instance where we fail to comply with the spirit or intent of the provisions in TBOR is among the most serious breaches of our responsibilities to protect taxpayers' rights.

taxpayer's rights and options. And if, at any point in this process, the taxpayer decides to agree and to waive further procedural safeguards, pursuant to § 6213(d), the waiver document the taxpayer signs is phrased to ensure that a knowing and voluntary waiver is being made.⁷

Specific Application

First, if the Service sends a math error notice and the taxpayer does not respond within 60 days, it is clear that -- as in the case of a defaulted deficiency notice -- the Service is authorized to proceed, in effect, as though the taxpayer agreed with the adjustment (or chose to dispute it in the context of a refund claim). Although Publication 1 is not normally sent with a math error notice (consistent with Congress' admonition to avoid repetitive mailings, see § 6227(c), TBOR 1) -- and, as explained above, would not cover abatement rights in any event -- the taxpayer's rights have presumably been explained in the notice itself.⁸ In such cases, the Service is not obligated to follow up in any way to ensure that the taxpayer actually intends to waive his or her rights.

Once a taxpayer takes the initiative to respond to the math error notice, however, we believe the balance of considerations shifts. Of course, if the taxpayer is able to furnish the necessary information or otherwise convince the Service representative that the adjustment is incorrect (the Internal Revenue Manual refers to this as a "substantiated protest"), the

⁷ For example, the most common agreement form, Form 870, "Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment," contains the following statement, preceding the taxpayer signature block:

I consent to the immediate assessment and collection of any deficiencies (*increase in tax and penalties*) and accept any overassessment (*decrease in tax and penalties*) shown above, plus any interest provided by law. I understand that by signing this waiver, I will not be able to contest these years in the United States Tax Court, unless additional deficiencies are determined for these years.

⁸ For example, after explaining the adjustment, the pattern letters created to implement the Service's new EIC/TIN math error authority state:

If you disagree, you may appeal the changes described on this notice within 60 days from the notice date. [The taxpayer is instructed to telephone.] If you are able to provide the necessary information, we will correct your return. . . . If you are not able to provide the necessary information, you can, within 60 days from the date of this notice, request abatement (reduction) of the change. We will do so and refer your case for further review by an examination officer. Any refund or credit you claim may be held pending review. If, after review, we determine your tax should still be changed, you may have additional appeal rights, which will be explained in a subsequent notice [normally, Publication 1]. We will continue to charge interest if you do not pay any balance you owe by the date requested in this notice.

assessment will be abated. Similarly, if the taxpayer clearly agrees with the adjustment, there is no need to abate.

However, if, after explanation, the taxpayer expresses disagreement (an "unsubstantiated protest") -- or if there is doubt as to whether the taxpayer agrees or disagrees -- the taxpayer's options and the consequences of those options should be explained clearly, and the taxpayer should be asked whether he or she wishes to request abatement.

This procedure -- essentially the equivalent, for a telephone contact, of asking a taxpayer to sign a written waiver -- helps assure that the taxpayer is making a knowing, voluntary waiver of his or her rights, as contemplated by the statute, regardless of the taxpayer's level of education or knowledge of the tax law. It also reduces the need for subjective evaluations of the level of a particular taxpayer's disagreement -- whether the taxpayer is "protesting," "insisting," "demanding," etc. -- and gives effect to the statute, which merely requires a "request." Such a practice also eliminates requiring taxpayers to know or use "magic words" or phrases in order to obtain abatement. And, inasmuch as this procedure accomplishes these ends, it helps ensure uniform treatment of taxpayers nationwide.

With respect to the explanation and query that should be provided taxpayers in these situations, it may not be necessary to prescribe specific language. While an explanation such as the one provided in the pattern letter quoted in footnote 7 above would be adequate, there should be flexibility to adapt to the specific situation.

Generally, the Service representative should be confident that the taxpayer understands his or her options, and has been given a clear opportunity to make an informed decision. In a given situation, time permitting, it may be useful to refer the taxpayer to Publication 1 or related publications. While the taxpayer needs to know that an unagreed case will be referred for review by Examination, the Service representative should not appear to be threatening an audit. The Service representative may and should state that, given the nature of the adjustment, it is unlikely that it will ultimately be changed. However, if the taxpayer still does not agree, it is not necessary for the taxpayer to offer a satisfactory justification. In fact, no reason for an abatement request need be given at all. This is because the right to abatement is absolute: Under § 6213(b)(2), abatement shall occur upon request, and a timely abatement request must be honored. Finally, doubt should be resolved in favor of abating the assessment and resolving the matter through normal deficiency procedures.

Refund Situations

The conclusions above apply equally whether the math error adjustment (1) results in a balance due; (2) reduces a refund of estimated tax or withholding; or (3) reduces payment of a "refundable" credit, such as the earned income credit.

In the latter two situations (which may be especially common in cases involving the EIC and missing or incorrect TIN's, under § 6213(g)(2)(F)-(J)), the Service is not required to make the refund at the time it abates the math error adjustment, pending further review.

However, even when no refund is made, a taxpayer claiming a refund or credit who requests abatement of a math error adjustment is still entitled to the deficiency procedures, including appeal to the Tax Court. This is because prepayment credits, such as estimated tax payments and wage withholding, are not taken into account in determining a "deficiency." See § 6211(b)(1). Thus, abatement of the math error assessment will result in a deficiency -- that is, an excess of the correct tax, as proposed by the Service, over the tax as reported by the taxpayer. Similarly, Congress specifically amended the Code in 1988 to make EIC adjustments subject to deficiency procedures, even to the extent the credit is "refundable" to the taxpayer and regardless of whether it has been paid (prior to 1988, the EIC could be assessed summarily, without abatement rights). See § 6211(b)(4), former § 6201(a)(4).⁹

If you have comments or further questions, please contact Catherine Prohofskey at (202) 622-4930.

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by: _____/s/_____
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⁹ The conclusions in this memorandum do not apply to overstatements of estimated tax and withholding credits, which are subject to summary assessment as math errors with no right to abate. § 6201(a)(3).