OFFICE OF
CHIEF COUNSEL

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

October 27, 1999

Number: **200010005**
Release Date: 3/10/2000
CC:DOM:FS:PROC
TL-N-3075-99
UILC: 6404.00-00

MEMORANDUM FOR DISTRICT COUNSEL

FROM: ASSISTANT CHIEF COUNSEL (FIELD SERVICE)
CC:DOM:FS

SUBJECT: INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

This Field Service Advice responds to your memorandum dated June 10, 1997. Field Service Advice is not binding on Examination or Appeals and is not a final case determination. This document is not to be cited as precedent.

LEGEND

Year 1 =
Year 5 =
Day 1 =
Day 2 =
Day 3 =
Day 4 =
Day 5 =
Day 6 =
Day 7 =

ISSUE

May the Service reverse a timely but erroneous abatement of an assessment after the statute of limitation for assessment has expired?

CONCLUSION

Whenever an abatement is issued because of a clerical error or mistake of fact, the assessment can be reinstated, at least so long as this does not prejudice the taxpayer. Under the facts of the present case, however, there was no clerical error or mistake of fact that would allow for reinstatement of the assessment.

FACTS

The taxpayers filed their Year 1 tax return on Day 1 and paid the tax liability reported on their return. The Year 1 tax return was assigned to a revenue agent for audit on Day 2. The revenue agent issued the audit report on Day 3 determining additional tax. The taxpayers' authorized representative agreed and signed the audit report. On Day 4, the Service assessed the additional tax and interest.

The taxpayers filed an amended Year 1 return in April Year 5 showing that the tax they owed was less than that reported on their original return. The same revenue agent was assigned to audit the amended return. The revenue agent reduced the tax liability based on her audit, but not for the full amount claimed by the taxpayers. On Day 5, the taxpayers signed Form 3363, Acceptance of Proposed Disallowance of Claim for Refund or Credit, Form 2297, Waiver of Statutory Notification of Claim Disallowance, and Form 4549, report of Income Tax Examination Changes.

While their amended return was being processed by the Service, on Day 6, petitioners filed a second copy of their amended return with the Service Center. Not realizing that a copy of that same amended return was under audit, the Service Center erroneously made a 291 posting (abatement of prior tax assessment) to the taxpayers' account on Day 7. As a result a portion of their tax and interest was abated. The taxpayers received no refund because they had not paid the additional tax determined during the first audit. Instead, the abatement merely reduced the taxpayers' liability.

When asked the circumstances under which she made the abatement, the Service employee who adjusted the taxpayers' account stated as follows:

> I was new to working the 1040X program. I had to send the 1040X back to the taxpayer for spouse's signature. When it came back, I must have overlooked the prior adjustment and worked the amended as filed.

LAW AND ANALYSIS

Generally, when an assessment is abated, it is thereby canceled and cannot be resurrected if the Service later decides that its decision was incorrect. Crompton-Richmond, Co. v. United States, 311 F. Supp. 1184, 11186 (S.D.N.Y. 1970). Instead, the Service must make a new assessment. A few cases, however, recognize limited circumstances in which an abated assessment may be reinstated, even when the statute of limitations precludes a new assessment. In re Bugge, 99 F.3d 740 (5th Cir. 1996); Crompton-Richmond Co. v. United States, supra; Colburn v. Commissioner, T.C. Memo. 1995-588 (citing Crompton-Richmond favorably).

1. Crompton-Richmond

In Crompton-Richmond the court set forth the following rule:

> A distinction must be drawn between a substantive reconsideration of the taxpayer's liability by the IRS and a clerical error committed by the IRS that has the same effect. Whenever an abatement is issued because of a mistake of fact or bookkeeping error, the assessment can be reinstated, at least so long as this does not prejudice the taxpayer.

Moreover, the Internal Revenue Manual references this case as authority to reverse an abatement. IRM 57(16)5.2; see also IRM 3.17.46.2.8.

The particular error in Crompton-Richmond involved a 100% penalty that was assessed against more than one responsible person. When one of the responsible persons paid the penalty and the limitations period to file a refund suit elapsed, the District Director believed the 100% penalty had been satisfied and was not subject to refund. He therefore requested that the Service Center abate the assessment against the other responsible persons.

The District Director was unaware, however, that the person who paid the 100% penalty had filed a timely refund suit that was still pending. Thus, the Director's request was based on a mistake of fact. Moreover, in granting the Director's request, the Service Center was operating under the same mistake of fact. Accordingly, applying the above-quoted rule, the court found the assessment could be reinstated.

In further explaining why the abated assessment could be reinstated, the court contrasted abatements based on clerical errors or mistakes of fact with abatements made only after review of assessments upon the merits and after re-evaluation of the taxpayer's liability. "In this latter situation the Commissioner is understandably precluded from canceling an abatement and reinstating an assessment merely because, upon further consideration, he has decided to change his position." Crompton-Richmond, 311 F. Supp. at 1187.

Under the facts presented, the Service abated an assessment upon consideration of the taxpayers' amended return on which the taxpayers claimed a decreased tax liability. We believe that consideration of an amended return necessarily requires a re-evaluation of a taxpayer's liability on the merits, no matter how perfunctory or unsophisticated that re-evaluation may be. As such, the abatement made in the present case was not the result of a clerical error.

It may be true that the Service employee who abated the assessment overlooked the fact that the taxpayers' amended return was under audit and that, had she known of the audit, she would have forwarded the amended return to Examination as directed by IRM 4144.33. These circumstances, however, do not alter the fact that the determination to abate the assessment was made on the merits.

Moreover, we note that the circumstances presented in the present case are the very circumstances that the Crompton-Richmond court distinguished from the abatement at issue there. The court stated that the abatement "was not in response to any protest by [the taxpayer] and was not made after reconsideration of his liability." In the present case, the abatement was in response to the taxpayers' protest and was made after reconsideration of their liability. Accordingly, Crompton-Richmond does not provide authority for the conclusion that the assessment abated in the present case may be reinstated.

2. In re Bugge

The Fifth Circuit has adopted a different analysis than the court in Crompton-Richmond. In In re Bugge, 99 F.3d 740 (5th Cir. 1996), the Service intended to abate an apparent duplicate assessment, and inadvertently abated the taxpayer's entire tax liability. In considering whether the Service could rely on the assessment that was erroneously abated, the court rejected the analysis in Crompton-Richmond and held, on the particular facts before it, that no effective tax abatement under the statutory authority of I.R.C. § 6404(a)(1) ever occurred. Id. at 745. The court reasoned that, although the request to abate a duplicate assessment was within the Service's authority under § 6404(a)(1) to abate an assessment that is "excessive in amount," the elimination of the taxpayer's entire liability was an unintended abatement lacking any authorization.

The present case does not involve the same kind of error. The abatement by the Service Center was the intended result of the Service Center's evaluation of the taxpayers' amended return. Although the IRM directed the Service Center to forward the amended return to Examination because the taxpayers were under audit, the IRM is merely directory, not mandatory. No provision of law prohibited the Service Center from making a determination, based on the amended return, that the assessed tax was excessive in amount. Accordingly, the analysis in Bugge would not support reversing the abatement made in the present case.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

In addition to the inapplicability of Bugge to the present case, we note that to follow the ruling in Bugge would involve the adoption of a vague standard regarding what sorts of abatements would be considered unauthorized. As such, it would be difficult for the Service to apply as a general rule. Moreover, the reasoning of

Bugge has not been adopted by any other circuit, much less the Circuit where the taxpayer resides. Therefore, we believe it inadvisable to reinstate the assessment based on the authority of Bugge.

If you have any further questions, please call the branch telephone number, 202-622-7940.

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