OFFICE OF
CHIEF COUNSEL

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
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INTERNAL REVENUE SERVICE NATIONAL OFFICE
SIGNIFICANT SERVICE CENTER ADVICE

MEMORANDUM FOR ASSOCIATE DISTRICT COUNSEL, ROCKY MOUNTAIN ASSOCIATE DISTRICT, CC:WR:RMD:SLC

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

SUBJECT: Reversal of Erroneous Abatement

This Significant Service Center Advice responds to your memorandum dated September 1, 1998, in connection with a question concerning the reversal of an abatement after the statute of limitations on assessment has expired. This document is not to be used or cited as precedent.

ISSUE

Under what circumstances may the Service reverse an abatement of tax after the statute of limitations for assessment has expired.

CONCLUSION

The service center may not reverse abatements after the statute of limitations for assessment has expired unless the abatement was made as a result of a clerical error, as described in Crompton-Richmond Co., Inc. v. United States, 311 F. Supp. 1184 (S.D.N.Y. 1970).

FACTS

Your office has been advised that persons working at the service center often receive requests to reverse abatements after the statute of limitations on assessment has expired. These requests do not always appear to meet the requirements of being corrections of mere clerical errors Nor does it appear that persons requesting reversal of abatements

give adequate consideration of the prejudice to taxpayers. Concern has been expressed that section 3.17.46.2.8 (1) of the IRM (Revised 1-1-99), which was based on Crompton-Richmond is now obsolete in light of Matter of Bugge, 99 F.3d 740 (5th Cir. 1996). In light of Bugge, the standards for making reversals of abatements are unclear and you have requested clarification.

LAW AND ANALYSIS

Generally, the Service must assess taxes within three years after the tax return is filed. I.R.C. § 6501. Section 6404(a) empowers the Service to abate the unpaid portion of an assessment that is (1) excessive in amount; (2) assessed after the expiration of the applicable period of limitations; or (3) erroneously or illegally assessed. Generally, for a tax abatement to be effective, it must be made pursuant to one of these three subsections. See Matter of Bugge, supra.

Section 6404(c) of the Code, which is titled "Small Tax Balances," authorizes the Service to write off accounts receivable, by abating assessments, if the collection costs do not warrant pursuing collection of the assessed amounts. Section 6404(c) does not authorize reversals of such abatements. The statute merely authorizes the Commissioner to formulate uniform instructions for writing off balances. At the present time, there are no regulations for writing off balances. Although the statute distinguishes a § 6404(a) abatement from a § 6404(c) abatement, neither may be reversed unless Crompton-Richmond applies.

In Crompton-Richmond, supra, the district court determined that, if the taxpayer will not be harmed, the Service can reinstate a liability that has been abated, or reduced without having been assessed, as a result of a mistake of fact or clerical error not going to the determination of the tax imposed. In Crompton-Richmond, an assessment against one party was mistakenly abated due to the failure of a Service employee to notice that a pending refund suit of another party precluded that abatement. There, the court distinguished clerical errors and mistakes of fact from those cases in which the Service abates an assessment after a substantive reconsideration of the taxpayer's liability. The court stated as follows:

> 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.

Crompton-Richmond, 311 F. Supp. at 1188.

Based on Crompton-Richmond case, the Service issued IRM 3.17.46.2.8, which states as follows:

(1) General–This section provides instructions for processing non-rebate erroneous abatement cases in which Master File computer programming prevents the reversal of abatement transactions after the statute of limitations for assessment has expired. These cases are limited to situations in which an erroneous abatement occurred due to a clerical error that served to reduce the tax liability of that account or another account. The Service will treat the account as any other account where the original tax liability has never been paid.

a. Court cases generally support the position that whenever an abatement is issued because of a mistake of fact or bookkeeping error, the assessment can be reinstated so long as this does not prejudice the taxpayer.

b. Any abatement based on a clerical error (mistake) will be treated as a nullity, thereby allowing the assessment to survive and taking the position that by such actions, the original assessment (including any supplemental assessment) is collectible provided the statute for collection after assessment has not expired at the time of the reversal.

c. Any penalties and interest that were erroneously abated can be assessed as if the erroneous abatement had never occurred. Penalties and interest should also continue to accrue as if the erroneous abatement had not occurred.

d. Additional instructions are found in IRM 121.1, Statute of Limitations.

In Matter of Bugge, a valid assessment was mistakenly abated when a collections manager ordered the abatement of what he believed to be a duplicate assessment which, when processed by the service center, resulted in the abatement of the entire tax liability. In that case, the court rejected the Crompton-Richmond theory that, in the case of a clerical error, the erroneously abated assessment may be reinstated and instead reasoned that an erroneous abatement resulting from a clerical error is not a valid abatement. As a consequence, the court held that the original assessment stands. In reaching this conclusion, the court examined whether the collections manager intended to abate the taxpayer's entire liability. Finding that the collections manager intended to abate a duplicate assessment, not the entire liability, the court concluded that the abatement was outside the scope of the Service's authority under the Code and hence, was ineffectual. In Bugge, the Fifth Circuit cautioned that the IRS should not view this opinion as providing it any special shield from responsibility for its errors. The pertinent wording of the court is as follows:

> A number of courts, including the United States Supreme Court, have recognized the authority of a government agency to correct inadvertent, ministerial errors (see, e.g., American Trucking Ass'ns. v. Frisco

> Transportation Co., 358 U.S. 133, 144-46 (1958); Zenith Electronics Corp. v. United States, 884 F.2d 556, 560 (Fed. Cir. 1989). In no way should this opinion, however, be interpreted as granting the IRS a special shield from responsibility for its errors, inadvertent or otherwise, that prejudice the taxpayer.

Bugge v. United States, 99 F.3d at 746, n.7.

Because the Fifth Circuit's reasoning in Bugge leaves the Service with a vague standard regarding what sorts of abatements would be considered unauthorized, we decline to advise a revision of the Internal Revenue Manual based on Bugge. Instead, we believe a clarification of the standards for making abatements and reversing them would be useful.

In Crompton-Richmond, the court distinguished clerical errors and mistakes of fact from those cases in which the Service abates an assessment after a reconsideration of the taxpayer's liability. Only inadvertent clerical or ministerial errors qualify for reinstatement of an original assessment. There are a myriad of different errors that can be classified as clerical or ministerial and that result in erroneous abatements, credits, or refunds. For example, clerical errors can occur when a credit is posted to the wrong TIN, a designated payment is posted to the wrong module, or a typographical error is made when imputing information. Each case must be evaluated in light of its particular circumstances.

It should be noted that if a clerical or ministerial error results in a refund, the Service cannot simply collect on that liability where the liability has already been satisfied by the taxpayer. See Bilzerian v. United States, 86 F.3d 1067, 1069 (11th Cir. 1996), remanded sub nom., Steffan v. United States, 952 F. Supp. 779 (M.D. Fl. 1997), acq. in result only, 1998 AOD LEXIS 8; and Clark v. United States, 63 F.3d 83, (1st Cir. 1995). The Service now agrees that an erroneous refund of an amount paid by the taxpayer in satisfaction of an assessment does not revive that assessment to the extent of the refund. Consequently, if a taxpayer fully pays the assessment in the case of a clerical error, the Service may no longer rely on the original assessment and must reassess the tax within the 3-year limitations period.

The Service's position for determining whether a reversible clerical error has occurred focuses not on the issue of the authority of the actor, but on whether the abatement is based on a substantive redetermination of the liability, namely whether there was a deliberate, intentional abatement of a tax liability. For example, if the Service overrides an examination hold code entered on the account in response to a "blown assessment" report, such action is deliberate and intentional and is done in response to a substantive redetermination of liability. Likewise, an abatement which arises out of a discharge in bankruptcy is a substantive redetermination of liability. We recognized that the Service position presents problems of administration. At the present time, the position is under study.

If you have any questions concerning the above, please call.

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