

Office of Chief Counsel
Internal Revenue Service
memorandum

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to: Area Counsel (Small Business/Self-Employed: Area 8) CC:SB:8:LN:3

from: Richard G. Goldman
Branch Chief
CC:PA:APJP:B3

subject: **Abatement of Tax Liabilities**

This Chief Counsel Advice responds to your memorandum dated November 21, 2002. In accordance with I.R.C. § 6110(k)(3), this Chief Counsel Advice should not be cited as precedent.

LEGEND

X =
Y =
Z =
date 1 =
date 2 =

ISSUES

Whether the Service may abate the remaining tax liabilities for the victims of this conspiracy as well as refund any amounts previously paid for those periods and applied to the outstanding tax liabilities.

CONCLUSIONS

No. No relief for the victims is provided for under the relevant Code provisions for abatement, credit, and refund.

FACTS

X was employed as a revenue officer with the Service. On Date 1, X was indicted on one count of conspiracy and two counts of acts of officers against the United States. On Date 2, X was found guilty of those counts.

The TIGTA and CI investigation of the case began when an informant reported to the Service alleged misconduct between X and two private income tax preparers, Y and Z.

The misconduct centered on an arrangement between Y, Z, and X. Y and Z told their clients that they would submit an offer-in-compromise to the Service on the clients' behalf, and held themselves out to be experts at taking care of liabilities. Allegedly, Y and Z also stated that they had someone working with them "on the inside." Y and Z did not submit the OICs to the Service, and instead pocketed the money tendered for the OICs and associated fees. Refund amounts otherwise owing were used to offset outstanding liabilities.

X was convicted on evidence that X conspired with Y and Z to keep their cases in "53" status (currently non-collectible). Such evidence included that X accessed hundreds of cases in IDRS in which Y was the representative. Of those cases, X was only assigned to a few. Phone records indicate numerous phone calls between Y, Z, and X both at the office and at home. There appears to be some coordination between the visits of Z to a taxpayer and field visits to the same taxpayer by X made shortly thereafter.

LAW AND ANALYSIS

I.R.C. § 6404(a) provides that the Service may abate any unpaid portion of an assessment of tax or liability if it is (1) excessive in amount, (2) assessed after the expiration of the applicable period of limitations, or (3) is erroneously or illegally assessed. Here, the amounts assessed against the victimized clients are none of the above. The amounts are correct and were timely and properly assessed. As such, this provision would not provide any relief for the taxpayer clients.

I.R.C. § 6404(e) provides for abatement of interest, for tax years beginning after July 30, 1996, where the deficiency is attributable to a unreasonable error or delay by an employee in the performance of a ministerial or managerial act.¹ A ministerial act is a procedural or

¹For taxable years beginning between December 31, 1978, and July 30, 1996, the Service may abate interest for any error or delay only in the performance of a ministerial act. Since all of the taxable years at issue in the instant situation are prior to July 30, 1996, only ministerial errors or delays may justify abatement of interest under this provision.

(continued...)

mechanical act that does not require judgment or discretion. Treas. Reg. § 301.6404-2(b)(2). A managerial act is an administrative act which involves the permanent loss of records or the exercise of judgment or discretion relating to management of personnel. Treas. Reg. § 301.6404-2(b)(1). These acts must be performed by “an officer or employee of the Internal Revenue Service (acting in his official capacity).” Here, although the actions of X are arguably ministerial in nature, X was not acting in an official capacity in deliberately entering the false non-collectible status. Of the hundreds of cases X accessed, X was only assigned to a few. In addition, X’s actions were ultra vires; that is, they were outside the powers delegated to X. While X may have been authorized to enter cases as non-collectible, X was not authorized to do so (1) in cases that were not assigned to X nor (2) without the proper determinations being made. Since there was no ministerial or managerial error here, the taxpayer clients would not be entitled to relief under I.R.C. § 6404(e).

Even assuming X’s illegal and unauthorized acts could be attributed to the Service for purposes of section 6404(e), that section would authorize abatement only of the interest on a tax liability, and not the underlying tax itself.

Under I.R.C. § 6402(a), where the taxpayer has made an overpayment, the Service may credit the amount of the overpayment against any liability outstanding and/or shall refund any balance to that taxpayer. Here, no payments have been made to the Service. While the taxpayer clients may have given money to Y and Z or X, that money was never received by the Service as a payment or credited to those taxpayers. As such, the Service properly offset refund claims to the liabilities remaining unpaid, and no credit or refund is owed.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

Some negative publicity may result if the liabilities are not abated or the offset amounts are not refunded. Under the relevant statutory provisions, there is no remedy which the Service can provide to these taxpayers and granting relief not authorized by law may generate its own adverse publicity. [REDACTED]

[REDACTED] Furthermore, the affected taxpayers continue to be free to pursue legitimate offers-in-compromise or other legitimate means to resolve their tax liabilities.

¹(...continued)

In addition, several of the outstanding liability amounts are for employment taxes. The Service lacks the authority to abate interest for these items under section 6404(e). Woodral v. Commissioner, 112 T.C. 19, 25 (1999).

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Please call if you have any further questions.