

[4830-01-u]

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 301

[TD 8789]

RIN 1545-AV32

Abatement of Interest

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulation.

SUMMARY: This document contains final regulations relating to the abatement of interest attributable to unreasonable errors or delays by an officer or employee of the IRS in performing a ministerial or managerial act. The final regulations reflect changes to the law made by the Tax Reform Act of 1986 and the Taxpayer Bill of Rights 2. The final regulations affect both taxpayers requesting abatement of certain interest and IRS personnel responsible for administering the abatement provisions.

DATES: Effective Date: These regulations are effective December 18, 1998.

Applicability date: For dates of applicability, see §301.6404-2(d).

FOR FURTHER INFORMATION CONTACT: Michael L. Gompertz, (202) 622-4910 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

### **Background**

This document contains amendments to the Procedure and Administration Regulations (26 CFR Part 301) relating to the

abatement of interest attributable to unreasonable errors or delays by an officer or employee of the IRS under section 6404(e)(1) of the Internal Revenue Code. Section 6404(e)(1) was enacted by section 1563(a) of the Tax Reform Act of 1986 (1986 Act) (Public Law 99-514 (100 Stat. 2762) (1986)) and amended by section 301 of the Taxpayer Bill of Rights 2 (TBOR2) (Public Law 104-168 (110 Stat. 1452) (1996)).

Section 6404(e)(1) applies only to interest on taxes of a type for which a notice of deficiency is required by section 6212, that is, income tax, estate tax, gift tax, generation-skipping transfer tax, and certain excise taxes. Requests for abatement of interest should be made on Form 843, "Claim for Refund and Request for Abatement." For more information, see Publication 556, "Examination of Returns, Appeal Rights, and Claims for Refund."

As enacted by the 1986 Act, section 6404(e)(1) provided that the IRS may abate interest attributable to any error or delay by an officer or employee of the IRS (acting in an official capacity) in performing a ministerial act. The legislative history accompanying the Act provided:

The committee intends that the term 'ministerial act' be limited to nondiscretionary acts where all of the preliminary prerequisites, such as conferencing and review by supervisors, have taken place. Thus, a ministerial act is a procedural action, not a decision in a substantive area of tax law.

H.R. Rep. No. 426, 99th Cong., 1st Sess. 845 (1985); S. Rep. No. 313, 99th Cong., 2d Sess. 209 (1986).

Further, Congress did not intend that the abatement of interest provision "be used routinely to avoid payment of interest." H.R. Rep. No. 426, 99th Cong., 1st Sess. 844 (1985); S. Rep. No. 313, 99th Cong., 2d Sess. 208 (1986). Rather, Congress intended abatement of interest to be used in instances "where failure to abate interest would be widely perceived as grossly unfair." Id.

In TBOR2, Congress amended section 6404(e)(1) to permit the IRS to abate interest attributable to any unreasonable error or delay by an officer or employee of the IRS (acting in an official capacity) in performing a managerial act as well as a ministerial act.

Pursuant to the legislative history accompanying TBOR2, a managerial act includes a loss of records or a personnel management decision such as the decision to approve a personnel transfer, extended leave, or extended training. See H.R. Rep. No. 506, 104th Cong., 2d Sess. 27 (1996). The legislative history of TBOR2 distinguished a managerial act from a general administrative decision and provided that interest would not be abated for delays resulting from general administrative decisions. For example, the taxpayer could not claim that the IRS's decision on how to organize the processing of tax returns or its delay in implementing an improved computer system resulted in an unreasonable delay in the Service's action on the taxpayer's tax return, and so the interest on any subsequent deficiency should be waived. The amendments to section

6404(e)(1) are effective for interest accruing with respect to deficiencies or payments for taxable years beginning after July 30, 1996.

On August 13, 1987, the IRS published temporary regulations (TD 8150) in the **Federal Register** (52 FR 30162) relating to the definition of ministerial act for purposes of abatement of interest. A notice of proposed rulemaking (LR-34-87) cross-referencing the temporary regulations was also published in the **Federal Register** for the same day (52 FR 30177). No public hearing regarding these regulations was requested or held.

On January 8, 1998, the IRS published in the **Federal Register** a notice of proposed rulemaking (REG-209276-87) under section 6404(e)(1) withdrawing the prior notice of proposed rulemaking and reproposing a modified version of the prior notice to incorporate the changes made by TBOR2 (63 FR 1086).

One written comment was received on the proposed regulations. No public hearing regarding these regulations was requested or held. After consideration of the written comment, the proposed regulations published on January 8, 1998, are adopted with minor changes by this Treasury decision.

#### **Public Comments**

A comment letter was received proposing that a special effective date rule be added to the regulations applicable to the abatement of interest on estate tax. The comment letter noted that because estate tax is not imposed with respect to a taxable

year, it is difficult to apply the effective date rule in the proposed regulations to estate tax.

The comment letter also recommended that Example 11 be clarified to provide more detailed guidance in determining the amount of interest the IRS should abate. Further, the comment letter recommended that Example 12 be eliminated because errors in performing all interest computations should be considered ministerial. Finally, because it may be difficult for taxpayers to determine whether there has been delay by the IRS in performing a ministerial or managerial act, the comment letter recommended that the regulations authorize the Taxpayer Advocate to investigate on behalf of taxpayers the manner in which the IRS processed their cases. The commentator believes that this would assist taxpayers in filing requests for interest abatement.

#### **Explanation of Provisions**

In accordance with the first recommendation made in the comment letter, the final regulations include special effective date rules applicable to the abatement of interest on estate tax, gift tax, and generation-skipping transfer tax. The final regulations apply if the death occurred after July 30, 1996, or if the gift was made or the generation-skipping transfer occurred after December 31, 1996.

The other recommendations made in the comment letter are not adopted. The Treasury Department and the IRS believe that Example 11 does not need any clarification and that Example 12 is essentially correct as written (however, this Treasury decision

makes minor modifications to Example 12). Finally, the Treasury Department and the IRS believe that it is not necessary for the regulations to authorize the Taxpayer Advocate to assist taxpayers in regard to interest abatement claims. Taxpayers who seek abatement of interest should file Form 843. If the taxpayer believes the IRS has improperly denied the request for abatement, the taxpayer may seek the assistance of the Taxpayer Advocate without specific authorization in the regulations. Also, the taxpayer may file a petition in the Tax Court under section 6404(g) to obtain judicial review of the denial of the request for abatement.

The final regulations add a new example (Example 13) to the regulations. This example clarifies that if the examination of a taxpayer's return is delayed, and both the actions of the taxpayer and those of the IRS contribute to the overall delay, the IRS cannot abate interest attributable to delay caused by the taxpayer. However, the IRS may abate interest attributable to unreasonable delay in the performance of a ministerial or managerial act if no significant aspect of this delay is attributable to the taxpayer.

Finally, the final regulations make obsolete Rev. Proc. 87-42 (1987-2 C.B. 589). Rev. Proc. 87-42 provides instructions for requesting interest abatement under section 6404(e) and examples illustrating the definition of ministerial act. The guidance provided by Rev. Proc. 87-42 is no longer needed. The

instructions for requesting interest abatement are included in the instructions to Form 843.

**Effect on Other Documents**

Rev. Proc. 87-42 (1987-2 C.B. 589) is hereby terminated as of December 18, 1998.

**Special Analyses**

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because the regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Internal Revenue Code, the IRS submitted the notice of proposed rulemaking preceding these regulations to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

**Drafting Information**

The principal author of these regulations is David B. Auclair of the Office of Assistant Chief Counsel (Income Tax & Accounting). However, other personnel from the IRS and Treasury Department participated in their development.

**List of Subjects in 26 CFR Part 301**

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

**Adoption of Amendments to the Regulations**

Accordingly, 26 CFR part 301 is amended as follows:

PART 301--PROCEDURE AND ADMINISTRATION

Paragraph 1. The authority citation for part 301 is amended by adding an entry in numerical order for §301.6404-2 to read as follows:

Authority: 26 U.S.C. 7805 \* \* \*

Section 301.6404-2 also issued under 26 U.S.C. 6404; \* \* \*

Par. 2. Section 301.6404-2 is added to read as follows:

§301.6404-2 Abatement of interest.

(a) In general. (1) Section 6404(e)(1) provides that the Commissioner may (in the Commissioner's discretion) abate the assessment of all or any part of interest on any--

(i) Deficiency (as defined in section 6211(a), relating to income, estate, gift, generation-skipping, and certain excise taxes) attributable in whole or in part to any unreasonable error or delay by an officer or employee of the Internal Revenue Service (IRS) (acting in an official capacity) in performing a ministerial or managerial act; or

(ii) Payment of any tax described in section 6212(a) (relating to income, estate, gift, generation-skipping, and certain excise taxes) to the extent that any unreasonable error or delay in payment is attributable to an officer or employee of

the IRS (acting in an official capacity) being erroneous or dilatory in performing a ministerial or managerial act.

(2) An error or delay in performing a ministerial or managerial act will be taken into account only if no significant aspect of the error or delay is attributable to the taxpayer involved or to a person related to the taxpayer within the meaning of section 267(b) or section 707(b)(1). Moreover, an error or delay in performing a ministerial or managerial act will be taken into account only if it occurs after the IRS has contacted the taxpayer in writing with respect to the deficiency or payment. For purposes of this paragraph (a)(2), no significant aspect of the error or delay is attributable to the taxpayer merely because the taxpayer consents to extend the period of limitations.

(b) Definitions--(1) Managerial act means an administrative act that occurs during the processing of a taxpayer's case involving the temporary or permanent loss of records or the exercise of judgment or discretion relating to management of personnel. A decision concerning the proper application of federal tax law (or other federal or state law) is not a managerial act. Further, a general administrative decision, such as the IRS's decision on how to organize the processing of tax returns or its delay in implementing an improved computer system, is not a managerial act for which interest can be abated under paragraph (a) of this section.

(2) Ministerial act means a procedural or mechanical act that does not involve the exercise of judgment or discretion, and that occurs during the processing of a taxpayer's case after all prerequisites to the act, such as conferences and review by supervisors, have taken place. A decision concerning the proper application of federal tax law (or other federal or state law) is not a ministerial act.

(c) Examples. The following examples illustrate the provisions of paragraphs (b)(1) and (2) of this section. Unless otherwise stated, for purposes of the examples, no significant aspect of any error or delay is attributable to the taxpayer, and the IRS has contacted the taxpayer in writing with respect to the deficiency or payment. The examples are as follows:

Example 1. A taxpayer moves from one state to another before the IRS selects the taxpayer's income tax return for examination. A letter explaining that the return has been selected for examination is sent to the taxpayer's old address and then forwarded to the new address. The taxpayer timely responds, asking that the audit be transferred to the IRS's district office that is nearest the new address. The group manager timely approves the request. After the request for transfer has been approved, the transfer of the case is a ministerial act. The Commissioner may (in the Commissioner's discretion) abate interest attributable to any unreasonable delay in transferring the case.

Example 2. An examination of a taxpayer's income tax return reveals a deficiency with respect to which a notice of deficiency will be issued. The taxpayer and the IRS identify all agreed and unagreed issues, the notice is prepared and reviewed (including review by District Counsel, if necessary), and any other relevant prerequisites are completed. The issuance of the notice of deficiency is a ministerial act. The Commissioner may (in the Commissioner's discretion) abate interest attributable to any unreasonable delay in issuing the notice.

Example 3. A revenue agent is sent to a training course for an extended period of time, and the agent's supervisor decides not to reassign the agent's cases. During the training course,

no work is done on the cases assigned to the agent. The decision to send the revenue agent to the training course and the decision not to reassign the agent's cases are not ministerial acts; however, both decisions are managerial acts. The Commissioner may (in the Commissioner's discretion) abate interest attributable to any unreasonable delay resulting from these decisions.

Example 4. A taxpayer appears for an office audit and submits all necessary documentation and information. The auditor tells the taxpayer that the taxpayer will receive a copy of the audit report. However, before the report is prepared, the auditor is permanently reassigned to another group. An extended period of time passes before the auditor's cases are reassigned. The decision to reassign the auditor and the decision not to reassign the auditor's cases are not ministerial acts; however, they are managerial acts. The Commissioner may (in the Commissioner's discretion) abate interest attributable to any unreasonable delay resulting from these decisions.

Example 5. A taxpayer is notified that the IRS intends to audit the taxpayer's income tax return. The agent assigned to the case is granted sick leave for an extended period of time, and the taxpayer's case is not reassigned. The decision to grant sick leave and the decision not to reassign the taxpayer's case to another agent are not ministerial acts; however, they are managerial acts. The Commissioner may (in the Commissioner's discretion) abate interest attributable to any unreasonable delay caused by these decisions.

Example 6. A revenue agent has completed an examination of the income tax return of a taxpayer. There are issues that are not agreed upon between the taxpayer and the IRS. Before the notice of deficiency is prepared and reviewed, a clerical employee misplaces the taxpayer's case file. The act of misplacing the case file is a managerial act. The Commissioner may (in the Commissioner's discretion) abate interest attributable to any unreasonable delay resulting from the file being misplaced.

Example 7. A taxpayer invests in a tax shelter and reports a loss from the tax shelter on the taxpayer's income tax return. IRS personnel conduct an extensive examination of the tax shelter, and the processing of the taxpayer's case is delayed because of that examination. The decision to delay the processing of the taxpayer's case until the completion of the examination of the tax shelter is a decision on how to organize the processing of tax returns. This is a general administrative decision. Consequently, interest attributable to a delay caused by this decision cannot be abated under paragraph (a) of this section.

Example 8. A taxpayer claims a loss on the taxpayer's income tax return and is notified that the IRS intends to examine the return. However, a decision is made not to commence the examination of the taxpayer's return until the processing of another return, for which the statute of limitations is about to expire, is completed. The decision on how to prioritize the processing of returns based on the expiration of the statute of limitations is a general administrative decision. Consequently, interest attributable to a delay caused by this decision cannot be abated under paragraph (a) of this section.

Example 9. During the examination of an income tax return, there is disagreement between the taxpayer and the revenue agent regarding certain itemized deductions claimed by the taxpayer on the return. To resolve the issue, advice is requested in a timely manner from the Office of Chief Counsel on a substantive issue of federal tax law. The decision to request advice is a decision concerning the proper application of federal tax law; it is neither a ministerial nor a managerial act. Consequently, interest attributable to a delay resulting from the decision to request advice cannot be abated under paragraph (a) of this section.

Example 10. The facts are the same as in Example 9 except the attorney who is assigned to respond to the request for advice is granted leave for an extended period of time. The case is not reassigned during the attorney's absence. The decision to grant leave and the decision not to reassign the taxpayer's case to another attorney are not ministerial acts; however, they are managerial acts. The Commissioner may (in the Commissioner's discretion) abate interest attributable to any unreasonable delay caused by these decisions.

Example 11. A taxpayer contacts an IRS employee and requests information with respect to the amount due to satisfy the taxpayer's income tax liability for a particular taxable year. Because the employee fails to access the most recent data, the employee gives the taxpayer an incorrect amount due. As a result, the taxpayer pays less than the amount required to satisfy the tax liability. Accessing the most recent data is a ministerial act. The Commissioner may (in the Commissioner's discretion) abate interest attributable to any unreasonable error or delay arising from giving the taxpayer an incorrect amount due to satisfy the taxpayer's income tax liability.

Example 12. A taxpayer contacts an IRS employee and requests information with respect to the amount due to satisfy the taxpayer's income tax liability for a particular taxable year. To determine the current amount due, the employee must interpret complex provisions of federal tax law involving net operating loss carrybacks and foreign tax credits. Because the employee incorrectly interprets these provisions, the employee

gives the taxpayer an incorrect amount due. As a result, the taxpayer pays less than the amount required to satisfy the tax liability. Interpreting complex provisions of federal tax law is neither a ministerial nor a managerial act. Consequently, interest attributable to an error or delay arising from giving the taxpayer an incorrect amount due to satisfy the taxpayer's income tax liability in this situation cannot be abated under paragraph (a) of this section.

Example 13. A taxpayer moves from one state to another after the IRS has undertaken an examination of the taxpayer's income tax return. The taxpayer asks that the audit be transferred to the IRS's district office that is nearest the new address. The group manager approves the request, and the case is transferred. Thereafter, the taxpayer moves to yet another state, and once again asks that the audit be transferred to the IRS's district office that is nearest that new address. The group manager approves the request, and the case is again transferred. The agent then assigned to the case is granted sick leave for an extended period of time, and the taxpayer's case is not reassigned. The taxpayer's repeated moves result in a delay in the completion of the examination. Under paragraph (a)(2) of this section, interest attributable to this delay cannot be abated because a significant aspect of this delay is attributable to the taxpayer. However, as in Example 5, the Commissioner may (in the Commissioner's discretion) abate interest attributable to any unreasonable delay caused by the managerial decisions to grant sick leave and not to reassign the taxpayer's case to another agent.

(d) Effective dates--(1) In general. Except as provided in paragraph (d)(2) of this section, the provisions of this section apply to interest accruing with respect to deficiencies or payments of any tax described in section 6212(a) for taxable years beginning after July 30, 1996.

(2) Special rules--(i) Estate tax. The provisions of this section apply to interest accruing with respect to deficiencies or payments of--

(A) Estate tax imposed under section 2001 on estates of decedents dying after July 30, 1996;

(B) The additional estate tax imposed under sections 2032A(c) and 2056A(b)(1)(B) in the case of taxable events occurring after July 30, 1996; and

(C) The additional estate tax imposed under section 2056A(b)(1)(A) in the case of taxable events occurring after December 31, 1996.

(ii) Gift tax. The provisions of this section apply to interest accruing with respect to deficiencies or payments of gift tax imposed under chapter 12 on gifts made after December 31, 1996.

(iii) Generation-skipping transfer tax. The provisions of this section apply to interest accruing with respect to deficiencies or payments of generation-skipping transfer tax imposed under chapter 13--

(A) On direct skips occurring at death, if the transferor dies after July 30, 1996; and

(B) On inter vivos direct skips, and all taxable terminations and taxable distributions occurring after December 31, 1996.

**§301.6404-2T [Removed]**

Par. 3. Section 301.6404-2T is removed.

Michael P. Dolan

Deputy Commissioner of Internal Revenue

Approved: October 20, 1998

Donald C. Lubick

Assistant Secretary of the Treasury