

## Rev. Proc. 2005-38

### SECTION 1. PURPOSE AND SCOPE

This revenue procedure describes how taxpayers may seek administrative relief if the Internal Revenue Service (the Service) has assessed interest for periods during which interest should have been suspended under section 6404(g) of the Internal Revenue Code (the Code). Although there is no prepayment right to administrative relief under the Code with respect to the abatement of interest assessed in violation of section 6404(g), this revenue procedure provides a permissive procedure for seeking such relief.

### SECTION 2. BACKGROUND

.01 Section 6601 requires the payment of interest on any amount of tax imposed by title 26 that is not paid on or before the last date prescribed for payment of the tax. Section 6151 provides that the date for payment of tax is generally the date a taxpayer must file a return reporting the tax (determined without regard to any extension of time for filing the return). Section 6601(e) provides that interest shall be assessed, collected, and paid in the same manner as tax, and that any reference to tax in title 26 (except subchapter B of chapter 63, relating to deficiency procedures) shall be deemed also to refer to interest imposed under section 6601.

.02 Section 6404(a) authorizes the Secretary to abate an assessment of tax or any liability in respect thereof (including interest) if the assessment is excessive in amount, untimely, or erroneously or illegally assessed. Notwithstanding the authority provided by section 6404(a), section 6404(b) precludes taxpayers from filing administrative claims for abatement with respect to income, estate, or gift taxes. For other types of tax, taxpayers may file an administrative claim requesting that the Service abate an improper assessment as provided in section 301.6404-1(c) of the Regulations on Procedure and Administration.

.03 Section 6404(e) authorizes the Secretary to abate an assessment of interest

where the interest is attributable in whole or in part to any unreasonable error or delay by an officer or employee of the Service in performing a ministerial or managerial act. Section 6404(e) provides a limited exception to the general prohibition against claims for abatement with respect to income, estate, or gift taxes that is set forth in section 6404(b). See *Urbana v. Commissioner*, 122 T.C. 384, 389-90 & n.4 (2004); see also Treas. Reg. § 301.6404-2 (describing interest abatement rules under section 6404(e)).

.04 Except as provided in section 6404(g)(2), in the case of an individual who files an income tax return, section 6404(g)(1) suspends the accrual of interest and time-sensitive penalties if the Secretary does not provide notice to the taxpayer specifically stating the amount due and the basis for the liability within 18 months of the later of the due date of the return (without regard to extensions) or the date the return was filed.

Section 6404(g) was enacted as part of the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685, and relates to interest suspension, rather than interest abatement. Nothing in the statute or its legislative history suggests that Congress intended section 6404(g) to create an exception to the general rule of section 6404(b) that prohibits taxpayers from filing claims for abatement with respect to income tax. See H.R. Conf. Rep. No. 599, 105<sup>th</sup> Cong. 2d Sess. 259-60 (1998). Compare *id.* with H.R. Rep. No. 506, 104<sup>th</sup> Cong. 2d Sess. 27-28 (1996) (discussing amendments to section 6404(e) and an expansion of the circumstances in which interest can be abated and abatement determinations can be reviewed). Accordingly, claims for abatement of interest assessed for periods during which interest should have been suspended under section 6404(g) are barred by section 6404(b).

.05 Section 6404(h) provides the United States Tax Court with jurisdiction over any action brought by a taxpayer who meets the requirements of section 7430(c)(4)(A)(ii) to determine whether the Secretary's failure to abate interest was an abuse of discretion, and to order an abatement. The action must be brought within 180 days after the date of mailing

of the Secretary's final determination not to abate interest.

The judicial review provisions of section 6404(h) apply where the Service has abused its discretion by failing to abate interest as provided by section 6404. These provisions do not apply where the Service has failed to suspend interest under section 6404(g), except as provided in paragraph 3.03 below.

### SECTION 3. ADMINISTRATIVE REVIEW PROCEDURE

.01 Subject to the exception in paragraph 3.03 below, taxpayers may not submit claims for abatement of interest assessed with respect to periods during which interest should have been suspended under section 6404(g). Pursuant to this revenue procedure, however, taxpayers may notify the Service that interest was assessed in violation of section 6404(g) by submitting Form 843, "Claim for Refund and Request for Abatement." Taxpayers should write "Section 6404(g) Notification" at the top of the Form 843. The Service will review the Form 843 notification, decide whether to abate interest under section 6404(a), and notify the taxpayer of its decision. Because section 6404(g) is an interest suspension provision, rather than an interest abatement provision, and because section 6404(b) generally bars claims for abatement with respect to income tax, the notification to the taxpayer of the Service's abatement determination does not constitute a final determination letter from which the taxpayer can petition the Tax Court under section 6404(h).

.02 If the Service does not exercise its authority under section 6404(a) to abate interest alleged to have been assessed in violation of section 6404(g), the taxpayer may pay the disputed interest assessment, file an administrative claim for refund and, if that claim is denied or not acted upon within six months from the date of filing, bring suit for refund under section 7422 and 28 U.S.C. § 1346(a)(1).

.03 If a taxpayer asserts that the Service failed to suspend interest under section 6404(g) as a result of an unreasonable error or delay in performing a ministerial or managerial act within the meaning of section 6404(e), the taxpayer may submit a claim for abatement on Form 843. The Service will consider the claim and

issue a notice of final determination. If the Service denies the taxpayer's claim in whole or in part, taxpayers who meet the requirements referred to in section 7430(c)(4)(A)(ii) may petition the Tax Court under section 6404(h) to determine whether the denial was an abuse of discretion. Pursuant to section 6404(b), a claim may not be submitted under this section 3.03 asserting only that interest was assessed for periods during which interest should have been suspended under section 6404(g).

#### SECTION 4. EFFECTIVE DATE

This revenue procedure is effective July 11, 2005, the date this revenue procedure was released in the Internal Revenue Bulletin.

#### SECTION 5. DRAFTING INFORMATION

The principal author of this revenue procedure is Julie A. Jebe of the Office of Associate Chief Counsel (Procedure and Administration), Administrative Provisions and Judicial Practice Division. For further information regarding this revenue procedure, contact Branch 3 of Administrative Provisions and Judicial Practice at (202) 622-7950 (not a toll-free call).