OFFICE OF
CHIEF COUNSEL

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

March 26, 1999

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INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

MEMORANDUM FOR

FROM: DEBORAH A. BUTLER
ASSISTANT CHIEF COUNSEL (FIELD SERVICE)
CC:DOM:FS

SUBJECT:

This Field Service Advice responds to your memorandum dated November 5, 1998. 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:

YR1
YR5
YR6
YR7
YR12
YR13
YR14
YR15
YR16
YR17

Address 1

	Appeals Office 1 Appeals Office 2
	Appeals Officer 1 Appeals Officer 2
$	$a
$	$b
$	$c
$	$d
$	$e
$	$f

ISSUE(S):
Whether the hazards of litigation are such that interest on Petitioner's deficiency for Tax YR1 should be abated, under I.R.C. 6404(e)(1), for any period between the due date of the return through the present.

CONCLUSION(S):
[redacted]

FACTS:

During tax YR1, Petitioner was in sales and earned $a. Petitioner failed to file a tax return for tax YR1. On April YR5, the Internal Revenue Service prepared a substitute for return (SFR) for Petitioner's YR1 tax year, based on underreporter program information. On September 30, YR5, a Notice of Deficiency was sent to Petitioner at Address 1 asserting a tax deficiency in the amount of $b and additions to tax under I.R.C. § 6651, 6653(a)(1) and (2), and 6654. No copies of the Notice of Deficiency were sent to any other addresses. On October 3, YR5, the Notice of Deficiency was returned to the Service undelivered. Assessments of tax, penalty and interest were made on March 10, YR6, because no petition was filed with the Tax Court within 90 days.

According to the information you have provided, between June 10, YR6 and January 6, YR12, assessments were made, billing notices were sent, and the amounts collected were applied against Petitioner's account for YR1. On March 4, YR12, Petitioner filed a petition in the Tax Court asserting that the Notice of

Deficiency was not sent to Petitioner's last known address. A copy of the notice was attached to the petition.[1]

District Counsel filed a Motion to Dismiss for Lack of Jurisdiction because the petition was not timely filed in accordance with I.R.C. § 6213(a). On May 5, YR12, Petitioner filed an objection to the motion to dismiss. In the objection Petitioner stated that Petitioner never resided at Address 1 (the address on the September 30, YR5 Notice of Deficiency). Petitioner further stated that Petitioner never filed an income tax return from or received mail at Address 1.

District Counsel determined that there were no facts available to substantiate the use of Address 1 as Petitioner's last known address. In addition, at the time the Notice of Deficiency was issued, it appears that the Service was aware that Petitioner had several possible addresses. In light of the facts and circumstances, District Counsel asked the Court to dismiss the case on the ground that the Notice of Deficiency was not sent to the last known address and was therefore invalid. On June 4, YR12, the Court dismissed the case on those grounds.

On November 24, YR12, Appeals Office 1 reversed the tax, penalties and interest that had been assessed on March 10, YR6.

On December 10, YR12, Appeals Officer 1 sent Petitioner a letter acknowledging receipt of Petitioner's YR1 case. Appeals Officer 1 sent Petitioner another letter on January 10, YR13 noting an overpayment had been frozen; Petitioner had still not filed a YR1 tax return; Petitioner would be given until February 12, YR13 to submit a YR1 return (with supporting documents) or provide an explanation of why a return was not required; and, if the case was not resolved, another Notice of Deficiency would be issued to Petitioner's new address.

Appeals Officer 1 subsequently sent another letter to Petitioner on April 14, YR13 noting that Petitioner was required to file a tax return for YR1; and that Petitioner would be given until April 30, YR13 to submit a YR1 tax return.

Appeals Office 1 received Petitioner's YR1 tax return on May 3, YR13. The return reported the same amount of income as show on the Notice of Deficiency issued on

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[1]In the abatement of interest petition, Petitioner states that Petitioner first learned about the deficiency case in December YR7. The facts do not state how Petitioner learned of the deficiency case, how Petitioner got a copy of the Notice of Deficiency or why Petitioner waited until March 4, YR12 before filing a Tax Court petition. Other than stating that billing notices were sent and collections were applied to the account, the facts do not indicate whether Petitioner had actual contact with the Service regarding the YR1 deficiency between December YR7 and March 4, YR12.

September 30, YR5. The only difference between the return filed by Petitioner and the amount in the Notice of Deficiency was the self-employment tax. Petitioner subsequently disavowed the accuracy of the return that Petitioner submitted and sought deductions for automobile, travel, lodging and meals.

On May 18, YR13, Appeals Officer 1 sent Petitioner a letter offering to settle the case by allowing $c in additional business expenses. On July 14, YR13, Petitioner rejected Appeals Officer 1's settlement offer. Only July 29, YR13, Petitioner requested that his case be transferred to Appeals Office 2. The case was transferred on August 2, YR13 and assigned to Appeals Officer 2.

On August 24, YR13, Appeals Officer 2 sent Petitioner a letter informing Petitioner that he had received Petitioner's case. On October 20 YR13, Appeals Officer 2 sent Petitioner a letter scheduling an Appeals conference for November 4, YR13. The conference was held in December YR13. Petitioner continued to assert that Petitioner was entitled to additional deductions. Appeals Officer 2 offered to allow deductions in the amount of $d. Petitioner rejected the offer and no settlement was reached. A second conference was held by telephone on January 27, YR14 but no settlement was reached.

On August 12, YR14, a second Notice of Deficiency was issued to Petitioner for YR1. Petitioner filed a petition with the Tax Court on November 28, YR14. The case was originally calendared for trial on the November 6, YR15, calendar. Petitioner moved for a continuance and the motion was granted over respondent's objection.

On June 7, YR16, the Tax Court rendered its opinion and allowed Petitioner business deductions in the amount of $e. The Court also concluded that Petitioner intentionally failed to file Petitioner's YR1 income tax return and was liable for tax in the amount of $f, and additions to tax under I.R.C. § 6651, 6653(a)(1) and (2), and 6654.

Petitioner appealed the Tax Court's decision. The Court of Appeals affirmed the decision on October 2, YR17.

Petitioner is requesting the abatement of all of the interest on Petitioner's YR1 deficiency.

LAW AND ANALYSIS

I.R.C. § 6404(e)(1) authorizes the Internal Revenue Service to abate interest on a deficiency or a payment if it is determined that the interest was attributable to an Internal Revenue Service employee's error or delay in the performance of a ministerial act. The error or delay must have occurred after the taxpayer is

contacted in writing with respect to the deficiency or payment and no significant aspect of the error or delay can be attributable to the taxpayer.

Section 301.6404-2T(b)(1) of the Temporary Treasury Regulation defines a "ministerial act" as 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 ministerial act does not involve the exercise of judgment or discretion, nor does it involve a decision concerning the proper application of the tax law.[2]

In enacting I.R.C. § 6404(e), Congress did not intend that the abatement of interest provision "be used routinely to avoid payment of interest." Rather, Congress intended abatement of interest to be used in instances "where failure to abate interest would be widely perceived as grossly unfair." H.R. Rep. No. 426, 99th Cong., 1st Sess. 844 (1985); S. Rep. No. 313, 99th Cong., 2d Sess. 208 (1986).

Under I.R.C. § 6404(i)(1), the Tax Court may order an abatement of interest if it determines that the Commissioner's failure to abate was an abuse of discretion. In order to prevail, Petitioner must prove that the Commissioner exercised his discretion to abate interest arbitrarily, capriciously, or without sound basis in fact or law. Woodral v. Commissioner, 112 T.C. No. 3 (filed January 12, 1999).

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS:

As stated above, certain requirements must be met before the Service is authorized to abate interest under I.R.C. § 6404(e)(1). There must be an **error** by the **Service** in the performance of a **ministerial act.** The error must occur **after the taxpayer has been contacted in writing** with respect to the deficiency or payment, and **the taxpayer must have not significantly contributed to the error or delay.** Finally, the failure to abate interest must be perceived as **grossly unfair**.

[redacted]

[2]The final regulation, although generally applying to interest accruing for deficiencies or section 6212(a) tax payments for tax years beginning after July 30, 1996, contains the same definition of ministerial act. Treas. Reg. § 301.6404-2(b).

[redacted]

[redacted]

[redacted]

[redacted][3]

[redacted]

[3] [redacted]

[redacted]

[redacted]

[redacted]

Please call if you have any further questions.

By: _____
SARA M. COE
Chief, Procedural Branch