

September 24, 1997

Tax Court Jurisdiction Over
Abatement of Interest Cases

Subject: Pursuant to I.R.C. § 6404(g) **Cancellation Date:** Dec. 23, 1997

On August 5, 1997, the Tax Court issued two opinions in cases petitioned under I.R.C. § 6404(g). Both opinions address important issues involving the Tax Court's jurisdiction to review the Internal Revenue Service's determination not to abate interest.

Prior to the enactment of the Taxpayer Bill of Rights 2 (TBOR 2), Pub. L. 104-168, 110 Stat. 1452 (1996), no court had jurisdiction to review the Service's determination not to abate a taxpayer's interest. Section 302(a) of TBOR 2 added I.R.C. § 6404(g) to the Internal Revenue Code. I.R.C. § 6404(g) authorizes the Tax Court to determine whether the Service's failure to abate interest under I.R.C. § 6404 was an abuse of discretion. I.R.C. § 6404(g) provides in pertinent part, as follows:

(g) Review of Denial of Request for Abatement of Interest.--

(1) In General.--The Tax Court shall have jurisdiction over any action brought by a taxpayer who meets the requirements referred to in section 7430(c)(4)(A)(ii) to determine whether the Secretary's failure to abate interest under this section was an abuse of discretion, and may order an abatement, if such action is brought within 180 days after the date of the mailing of the Secretary's final determination not to abate such interest.

Section 302(b) of TBOR 2 states that I.R.C. § 6404(g) "applies to requests for abatement after the date of the enactment of this Act." Because TBOR 2 was enacted on July 30, 1996, the National Office took the position that the Tax Court's jurisdiction was limited to reviewing requests for abatement submitted to the Service after July 30, 1996.

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In Banat v. Commissioner, 109 T.C. No. 3 (August 5, 1997), the Service moved to dismiss petitioner-husband's case for lack of jurisdiction on the grounds that he had submitted his request for abatement to the Internal Revenue Service prior to the July 31, 1996, effective date of I.R.C. § 6404(g). In contrast to the Service's position, the Tax Court took a broad view of the effective date language and held that Congress did not intend to deny judicial review to taxpayers whose requests for abatement are "continuing, considered, and denied after the date of enactment [of I.R.C. § 6404(g)]." Because petitioner-husband's request for abatement was pending and denied by the Service after July 30, 1996, the court held that it had jurisdiction over his case.

Respondent also moved to dismiss petitioner-wife's case for lack of jurisdiction; however, the grounds for dismissal in the wife's case were that she had not submitted a request for abatement to the Service and that no final determination letter had been issued to her. The Tax Court agreed with respondent's position that it lacked jurisdiction over petitioner-wife. Accordingly, the court dismissed petitioner-wife from the case.

In White v. Commissioner, 109 T.C. No. 4 (August 5, 1997), respondent also moved to dismiss petitioners' case for lack of jurisdiction on the grounds that petitioners submitted their request for abatement prior to the effective date of I.R.C. § 6404(g). The Tax Court agreed that it lacked jurisdiction over petitioners' case because petitioners' request for abatement and the denial of the request both took place prior to July 31, 1996.

We believe that the Tax Court's opinion in Banat regarding the effective date of I.R.C. § 6404(g) is flawed. However, we intend to acquiesce in result and will follow the opinions in Banat and White. The number of cases affected by Banat is not large and most will be resolved on their merits by Appeals. Further, acquiescence to the jurisdictional issue will provide a quick, certain answer that will enable us and taxpayers to resolve many cases swiftly without having to wait for a potentially drawn out period of appeals to various circuits.

In view of the above, a motion to dismiss for lack of jurisdiction should not be filed if petitioner's request for abatement is pending and denied after July 30, 1996. Where the request for abatement was clearly denied prior to July 31, 1996, however, a motion to dismiss for lack of jurisdiction would be appropriate. Further, a second denial of a request for abatement will not convey jurisdiction if the first denial was made prior to July 31, 1996.

It should be noted, however, that even though the Tax Court may obtain jurisdiction to determine the merits of the taxpayer's

request to abate interest based upon statutory changes made in TBOR2, the merits of these cases are to be determined based upon pre-TBOR2 laws. Although § 301(b) of TBOR2 also amended I.R.C. § 6404(e) to broaden the circumstances for which deficiency interest could be abated, those amendments are effective only with respect to "deficiencies or payments for tax years beginning after July 30, 1996." In other words, the liberalized standards will apply generally to deficiencies for tax years 1997 and after. Thus for claims pending on July 30, 1996, or those made today, the circumstances for abatement are those only where there has been "an error or delay ... in performing a ministerial act." See Treas. Reg. 301.6404-2T(b).

All abatement of interest cases must continue to be coordinated with the Procedural Branch of the Field Service Division. In addition, all documents must be reviewed by the Procedural Branch before they are filed with the Tax Court. Following publication of this Notice, appropriate changes will be made to the Chief Counsel Directives Manual, and an Action on Decision acquiescing in result will be issued. For additional information about the subject of this Notice, please contact Pamela S. Wilson at (202) 622-7950.

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