

**Office of Chief Counsel
Internal Revenue Service**

Memorandum

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subject: The statute of limitations for assessment of the section 6651(a)(2) addition to tax for failure to pay the amount shown as tax on a return

This Advice responds to your request for assistance. This advice may not be used or cited as precedent.

ISSUE

Whether the statute of limitations for assessment of the section 6651(a)(2) addition to tax for failure to pay remains open after an erroneous administrative First Time Abatement, such that the Service may reassess the addition to tax.

CONCLUSION

The statute of limitations for assessment of the section 6651(a)(2) addition to tax is not subject to the section 6501(a) three year statute of limitations for assessment. The period of limitations for assessment remains open following the erroneous administrative First Time Abatement for amounts initially assessed less than ten years ago. The ten-year limitations period on collection would preclude making a new assessment for amounts for which that period has run.

(TPW) and (TPH) filed a joint return for taxable year , and did not pay the amount shown as tax on the return. The reported tax was assessed on . The taxpayers filed an amended joint return that reported more tax, which was assessed on . The Service assessed accrued amounts of the section 6651(a)(2) addition to tax for failure to pay on , and . On , TPH went into bankruptcy and the joint accounts were split into two MFT31 accounts.

On the Service, during a phone call with TPW, granted TPW a First Time Abatement (FTA) for the full amount of the section 6651(a)(2) addition to tax for failure to pay on TPW's MFT31 account. On , the Service determined that TPW should not have been granted a FTA. The Service discovered that TPW did not meet the eligibility requirements for a FTA because she had a penalty or addition to tax within the three years prior to the tax period at issue.

You have asked for assistance in determining whether the Service may reassess the section 6651(a)(2) addition to tax for failure to pay on TPW's MFT31 account upon the discovery that TPW should not have been granted a FTA for this tax period.

LAW AND ANALYSIS

If the Service abates an assessment of tax, and later determines that such abatement was erroneous, it may reassess the abated tax if the statute of limitations for assessment remains open. See Carlin v. United States, 100 F. Supp. 451, 455 (Ct. Cl. 1951) ("If the Commissioner abates the assessment, it ceases to exist or to have any effect thereafter. The Commissioner cannot subsequently rescind his actions or restore the assessment, but must rather make a new assessment unless, of course, the statute of limitations has previously expired."); see also Crompton-Richmond v. United States, 311 F. Supp. 1184, 1186 n.2 (S.D.N.Y. 1970) ("If the statute of limitations has not run, the IRS may simply make a new assessment of the tax liability that has been abated.").

The section 6651(a)(2) addition to tax for failure to pay an amount shown as tax on a return applies unless the failure is due to reasonable cause and not due to willful neglect. The addition to tax accrues in the amount of 0.5% of the amount of tax shown on the return if the failure to pay is for one month, with an additional 0.5% added to the tax for each additional month during which the failure continues, up to the maximum penalty of 25%. I.R.C. § 6651(a)(2).

Courts have discussed, but not explicitly defined the period of limitations for assessment and collection of the section 6651(a)(2) addition to tax. The section 6651(a)(2) addition to tax is not subject to the section 6501(a) three-year limitations period for the assessment of tax. United States v. Krasnow, 548 F. Supp. 686, 689 (S.D.N.Y. 1982). If the tax shown on the return remains unpaid, the section 6651(a)(2) addition to tax accrues to its maximum amount over the course of fifty-months. Courts reason that the

addition to tax could not be given its full effect if the Service was required to assess the addition within three years of the due date for filing a timely return because the maximum addition takes more than three years (fifty-months) to accrue. United States v.

Krasnow, 548 F. Supp. 686, 689 (S.D.N.Y. 1982); United States v. Estate of Hurd, 115 A.F.T.R.2d 2015-386 (C.D. Cal.).

The United States District Court for the Central District of California rejected the argument that assessments of the section 6651(a)(2) addition to tax were time-barred when made seven and eleven years after the assessment of the underlying tax. See United States v. Estate of Hurd, 115 A.F.T.R.2d 2015-386 (C.D. Cal.) (rejecting taxpayer's argument that assessment was time-barred by the ten-year collection period of limitations provided for in section 6502(a)(1) when the penalty had not previously been assessed).

These cases show that the section 6651(a)(2) addition to tax for failure to pay is generally not subject to the limitations period on assessment. Section 6502 imposes a ten-year limitations period on collection, however. The penalty has been assessed in parts at various times. The earliest assessment was _____, more than ten years ago. We know of no event that suspended the collection period. As a result, the Service may not now seek to collect the amount that was initially assessed in _____ and that amount should not be re-assessed. The collection statute on the other amounts assessed has not yet run, although there is only a short period left on the amounts initially assessed in _____. Those amounts, which were abated erroneously, may be assessed again, but the collection statute will run from the date of the initial assessment. The Service may not effectively extend the limitations period on collection by virtue of making a new assessment.

In United States v. Updike, 281 U.S. 489 (1930), the Supreme Court construed the predecessor to section 6502(a), which had language virtually identical to the language of section 6502(a). In considering whether the limitations period on collection had begun when the Service had assessed a tax to which no limitations period on assessment applied, the Court stated:

An actual assessment having been made, it must be assumed that the government was in possession of the facts which gave rise to the liability upon which the assessment was predicated. In such case to allow an indefinite time for proceeding to collect the tax would be out of harmony with the obvious policy of the act to promote repose by fixing a definite period after assessment within which suits and proceedings for the collection of taxes must be brought.

The same policy is present here. The Service would violate that policy if it attempted to manipulate abatements and assessments to extend the period of limitations on collection.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

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