

**Office of Chief Counsel  
Internal Revenue Service  
memorandum**

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date: September 28, 2017

to: John McInelly  
Program Manager  
(Office of Servicewide Penalties)

from: Adrienne Griffin  
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subject: Automation of the first time abatement administrative waiver policy

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

ISSUE

Authority for automation of the first time abatement administrative waiver of penalties policy.

CONCLUSION

The Commissioner has authority to waive penalties for classes of taxpayers under the first time abate policy in the exercise of enforcement discretion and based on a policy of enhancing voluntary compliance. Automation of the existing first time abatement policy does not affect the Commissioner's ability to exercise enforcement discretion with respect to the penalties included in the policy.

FACTS

Pursuant to I.R.C. § 6651, additions to tax are imposed for failure to file a tax return or to pay the tax shown on a return by the due date for filing. The amount of the addition is based upon the amount of tax reported on the return. Taxpayers are subject to a penalty under I.R.C. § 6656 for failure to deposit. Sections 6698 and 6699 impose penalties on partnerships and S-corporations, respectively, for failing to file the required returns. Each of these penalties contains an exception for reasonable cause.

Beginning in 2001, the Service implemented the first time abatement policy, which provides relief from the aforementioned penalties under certain circumstances.<sup>1</sup> A taxpayer qualifies for first time abatement if the taxpayer: (1) has not been required to file a return or has no prior penalties for the preceding three years; (2) has filed (or filed an extension) for all currently required returns; and (3) has paid or arranged to pay any tax currently due. First time abatement applies only to a single tax period, but because the policy requires only a three-year compliance history, it is possible for the same taxpayer to receive multiple first time abatements.<sup>2</sup> The current policy is to apply first time abatement to the earliest tax period that meets the first time abatement criteria. The policy is currently applied by the Reasonable Cause Assistant (RCA) software program performing a first time abatement analysis prior to conducting a reasonable cause analysis. Accordingly, only those taxpayers who assert reasonable cause as a defense to a penalty or those who are aware of first time abatement and specifically request it are considered for first time abatement. In 2012, TIGTA issued a report that found inconsistent application of first time abatement and recommended that the Service ensure taxpayers are aware of their potential ability to receive a first time abatement and develop a process to address any negative impact on taxpayers who are given first time abatement but would also qualify for abatement based on reasonable cause. See Penalty Abatement Procedures Should Be Applied Consistently to All Taxpayers and Should Encourage Voluntary Compliance, Reference Number: 2012-40-113 (September 19, 2012).

The IRS Office of Servicewide Penalties (OSP) has undertaken a project to automate the first time abatement process. Under the proposed automated process, all taxpayers who meet the first time abatement criteria will be granted a first time abatement waiver. Application of automated first time abatement will be achieved by “suppressing” the applicable penalty on Master File. That is, the penalty will be reflected on Master File, but the amount will be \$0. OSP estimates that automating first time abatement will increase the number of penalties waived per year from 350,000 to 1.7 million, with a corresponding dollar value increase from \$578 million to \$848 million per year. As with the current policy, the automated first time abatement would apply only to a single tax period, but if the three-year compliance requirement is retained, it will be possible for the same taxpayer to receive multiple first time abatements.

### LAW AND ANALYSIS

Section 7801(a) of the Code provides that the administration and enforcement of the tax law must be “performed by or under the supervision of the Secretary of the Treasury.” Section 7803 requires the appointment of a Commissioner of Internal Revenue in the Department of the Treasury, who has “such duties and powers as the Secretary may prescribe.” I.R.C. § 7803(a)(1), (2). The Commissioner has broad authority under I.R.C. § 7803(a)(2)(A) “to administer, manage, conduct, direct, and supervise the

<sup>1</sup> The first time abatement policy is set forth in section 20.1.1.3.6.1 of the IRM.

<sup>2</sup> For example, a taxpayer might receive first time abatement for tax year 2010, be compliant for tax years 2011 through 2014, and then receive an additional first time abatement for tax year 2015.

execution and application of the internal revenue laws or related statutes and tax conventions to which the United States is a party.” The authority to enforce a law includes the authority to refrain from taking enforcement action. Heckler v. Chaney, 470 U.S. 821, 831 (1985). “[A]n agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion.” Id. This is based on the principle that an agency has finite resources and must set enforcement priorities that take into account both those resources and the agency’s policies. See id. at 831-32 (describing why “an agency decision not to enforce often involves a complicated balancing of a number of factors which are particularly within its expertise”). Section 7803 and the principles found in Heckler v. Chaney generally support a policy decision to refrain from enforcing penalties against a certain class of taxpayers.

The legislative history of the Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, 103 Stat. 2106, more directly supports the first time abate policy. Within the legislative history to that Act, Congress indicated its intent that the IRS should develop a policy statement emphasizing that civil tax penalties exist for the purpose of encouraging voluntary compliance. See H.R. Conf. Rep. No. 386, 101<sup>st</sup> Cong., 1<sup>st</sup> Sess. 661 (1989). The Service has adopted this policy, which is set forth in Policy Statement P-20-1. IRM 1.2.20.1.1 (06-29-2004). The Service’s penalty policy specifically states that “[i]n limited circumstances where doing so will promote sound and efficient tax administration, the Service may approve a reduction of otherwise applicable penalties or penalty waiver for a group or class of taxpayers as part of a Service-wide resolution strategy to encourage efficient and prompt resolution of cases of noncompliant taxpayers.” Id. at (7).<sup>3</sup> Accordingly, the Commissioner has discretion to administer and enforce civil tax penalties to reflect the congressional intent to encourage voluntary compliance. Using this discretion, the Commissioner may choose not to impose a penalty on a particular class of taxpayers if he believes that doing so will enhance overall tax compliance. The Commissioner has already done so by establishing the first time abatement policy. Choosing to automate the operation of the policy does not have any effect on the underlying authority for it.

#### CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

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<sup>3</sup> In addition, part of the Service’s mission is to “enforce[e] the tax law with integrity and fairness to all,” which requires fair and equitable treatment to similarly-situated taxpayers. See Policy Statement 1-236 (10-24-2016).

[REDACTED]

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