(ii) *Gift tax.* The provisions of this section apply to interest accruing with respect to deficiencies or payments of gift tax imposed under chapter 12 on gifts made after December 31, 1996.

(iii) *Generation-skipping transfer tax.* The provisions of this section apply to interest accruing with respect to deficiencies or payments of generation-skipping transfer tax imposed under chapter 13—

(A) On direct skips occurring at death, if the transferor dies after July 30, 1996; and

(B) On inter vivos direct skips, and all taxable terminations and taxable distributions occurring after December 31, 1996.

[T.D. 8789, 63 FR 70013, Dec. 18, 1998]

§ 301.6404–3 Abatement of penalty or addition to tax attributable to erroneous written advice of the Internal Revenue Service.

(a) *General rule.* Any portion of any penalty or addition to tax that is attributable to erroneous advice furnished to the taxpayer in writing by an officer or employee of the Internal Revenue Service (Service), acting in his or her official capacity, shall be abated, provided the requirements of paragraph (b) of this section are met.

(b) *Requirements*—(1) *In general.* Paragraph (a) of this section shall apply only if—

(i) The written advice was reasonably relied upon by the taxpayer;

(ii) The advice was issued in response to a specific written request for advice by the taxpayer; and

(iii) The taxpayer requesting advice provided adequate and accurate information.

(2) *Advice was reasonably relied upon*—(i) *In general.* The written advice from the Service must have been reasonably relied upon by the taxpayer in order for any penalty to be abated under paragraph (a) of this section.

(ii) *Advice relating to a tax return.* In the case of written advice from the Service that relates to an item included on a federal tax return of a taxpayer, if such advice is received by the taxpayer subsequent to the date on which the taxpayer filed such return, the taxpayer shall not be considered to have reasonably relied upon such written advice for purposes of this section, except as provided in paragraph (b)(2)(iii) of this section.

(iii) *Amended returns.* If a taxpayer files an amended federal tax return that conforms with written advice received by the taxpayer from the Service, the taxpayer will be considered to have reasonably relied upon the advice for purposes of the position set forth in the amended return.

(iv) *Advice not related to a tax return.* In the case of written advice that does not relate to an item included on a federal tax return (for example, the payment of estimated taxes), if such written advice is received by the taxpayer subsequent to the act or omission of the taxpayer that is the basis for the penalty or addition of tax, then the taxpayer shall not be considered to have reasonably relied upon such written advice for purposes of this section.

(v) *Period of reliance.* If the written advice received by the taxpayer relates to a continuing action or series of actions, the taxpayer may rely on that advice until the taxpayer is put on notice that the advice is no longer consistent with Service position and, thus, no longer valid. For purposes of this section, the taxpayer will be put on notice that written advice is no longer valid if the taxpayer receives correspondence from the Service stating that the advice no longer represents Service position. Further, any of the following events, occurring subsequent to the issuance of the advice, that set forth a position that is inconsistent with the written advice received from the Service shall be deemed to put the taxpayer on notice that the advice is no longer valid—

(A) Enactment of legislation or ratification of a tax treaty;

(B) A decision of the United States Supreme Court;

(C) The issuance of temporary or final regulations; or

(D) The issuance of a revenue ruling, a revenue procedure, or other statement published in the Internal Revenue Bulletin.

(3) *Advice was in response to written request.* No abatement under paragraph (a) of this section shall be allowed unless the penalty or addition to tax is

attributable to advice issued in response to a specific written request for advice by the taxpayer. For purposes of the preceding sentence, a written request from a representative of the taxpayer shall be considered a written request by the taxpayer only if—

(i) The taxpayer's representative is an attorney, a certified public accountant, an enrolled agent, an enrolled actuary, or any other person permitted to represent the taxpayer before the Service and who is not disbarred or suspended from practice before the Service; and

(ii) The written request for advice either is accompanied by a power of attorney that is signed by the taxpayer and that authorizes the representative to represent the taxpayer for purposes of the request, or such a power of attorney is currently on file with the Service.

(4) *Taxpayer's information must be adequate and accurate.* No abatement under paragraph (a) of this section shall be allowed with respect to any portion of any penalty or addition to tax that resulted because the taxpayer requesting the advice did not provide the Service with adequate and accurate information. The Service has no obligation to verify or correct the taxpayer's submitted information.

(c) *Definitions*—(1) *Advice.* For purposes of section 6404(f) and the regulations thereunder, a written response issued to a taxpayer by an officer or employee of the Service shall constitute ''advice'' if, and only if, the response applies the tax laws to the specific facts submitted in writing by the taxpayer and provides a conclusion regarding the tax treatment to be accorded the taxpayer upon the application of the tax law to those facts.

(2) *Penalty and addition to tax.* For purposes of section 6404(f) and the regulations thereunder, the terms ''penalty'' and ''addition to tax'' refer to any liability of a particular taxpayer imposed under subtitle F, chapter 68, subchapter A and subchapter B of the Internal Revenue Code, and the liabilities imposed by sections 6038(b), 6038(c), 6038A(d), 6038B(b), 6039E(c), and 6332(d)(2). In addition, the terms ''penalty'' and ''addition to tax'' shall include any liability resulting from the application of other provisions of the Code where the Commissioner of Internal Revenue has designated by regulation, revenue ruling, or other guidance published in the Internal Revenue Bulletin that such provision shall be considered a penalty or addition to tax for purposes of section 6404(f). The terms ''penalty'' and ''addition to tax'' shall also include interest imposed with respect to any penalty or addition to tax.

(d) *Procedures for abatement.* Taxpayers entitled to an abatement of a penalty or addition to tax pursuant to section 6404(f) and this section should complete and file Form 843. If the erroneous advice received relates to an item on a federal tax return, taxpayers should submit Form 843 to the Internal Revenue Service Center where the return was filed. If the advice does not relate to an item on a federal tax return, the taxpayer should submit Form 843 to the Service Center where the taxpayer's return was filed for the taxable year in which the taxpayer relied on the erroneous advice. At the top of Form 843 taxpayers should write, ''Abatement of penalty or addition to tax pursuant to section 6404(f).'' Further, taxpayers must state on Form 843 whether the penalty or addition to tax has been paid. Taxpayers must submit, with Form 843, copies of the following—

(1) The taxpayer's written request for advice;

(2) The erroneous written advice furnished by the Service to the taxpayer and relied on by the taxpayer; and

(3) The report (if any) of tax adjustments that identifies the penalty or addition to tax and the item relating to the erroneous written advice.

(e) *Period for requesting abatement.* An abatement of any penalty or addition to tax pursuant to section 6404(f) and this section shall be allowed only if the request for abatement described in paragraph (d) of this section is submitted within the period allowed for collection of such penalty or addition to tax, or, if the penalty or addition to tax has been paid, the period allowed for claiming a credit or refund of such penalty or addition to tax.

(f) *Examples.* The following examples illustrate the application of section

6404(f) of the Code and the regulations thereunder:

Example 1. In February 1989, an individual submitted a written request for advice to an Internal Revenue Service Center and included adequate and accurate information to consider the request. The question posed by the taxpayer concerned whether a certain amount was includible in income on the taxpayer's 1989 federal income tax return. An employee of the Service Center issued the taxpayer a written response that concluded that based on the specific facts submitted by the taxpayer, the amount was not includible in income on the taxpayer's 1989 return. Since the response provided a conclusion regarding the tax treatment accorded the taxpayer on the basis of the facts submitted, the response constitutes ''advice'' for purposes of section 6404(f). The taxpayer filed his 1989 return and, relying on the Service's advice, did not include the item in income. Upon examination, it was determined that the item should have been included in income on the taxpayer's 1989 return. Because the taxpayer reasonably relied upon erroneous written advice from the Service, any penalty or addition to tax attributable to the erroneous advice will be abated by the Service. However, the erroneous advice will not affect the amount of any taxes and interest owed by the taxpayer (except to the extent interest relates to a penalty or addition to tax attributable to the erroneous advice) due to the fact that the item was not included in income.

Example 2. In March 1989, an individual submitted a written request to the National Office of the Internal Revenue Service regarding whether a certain activity constitutes a passive activity within the meaning of section 469 of the Code. The request did not meet the procedural requirements set forth by the National Office for consideration of the submission as a private letter ruling request and, thus, was not treated as such by the Service. The Service furnished the taxpayer with a written response that transmitted various published provisions of section 469 and the regulations thereunder relevant to the determination of whether an activity is passive within the meaning of those provisions. The Service also included a Publication regarding the tax treatment of passive activities. However, the Service's response contained no opinion or determination regarding whether the taxpayer's described activity was or was not passive under section 469. The Service's response is not advice within the meaning of section 6404(f), and cannot be relied upon for purposes of an abatement of a portion of a penalty or addition to tax under that section.

Example 3. On April 1, 1989, an individual submitted a written request for advice to an Internal Revenue Service Center. The advice related to an item included on a federal tax return. The individual filed a federal income tax return with the appropriate Service Center on April 15, 1989. Subsequently, on May 1, 1989, the individual received advice from the Service Center concerning the written request made on April 1. Because the individual filed his tax return prior to the date on which written advice from the Service was received, the individual did not rely on the Service's written advice for purposes of section 6404(f). If, however, the individual amends his tax return to conform with the written advice received from the Service, the individual will be considered to have reasonably relied upon the Service's advice.

Example 4. Individual A, on May 1, 1989, received advice from the Service that concluded that interest paid by the taxpayer with respect to a specific loan was interest paid or accrued in connection with a trade or business, within the meaning of section 163(h)(2)(A) of the Code. The advice relates to a continuing action. Therefore, provided the facts submitted by the taxpayer to obtain the advice remain adequate and accurate (that is, the circumstances relating to the indebtedness do not change), Individual A may rely on the Service's advice for subsequent taxable years until the individual is put on notice that the advice no longer represents Service position and, thus, is no longer valid.

Example 5. An individual, on June 1, 1989, received advice from the Service that concluded that no gain or loss would be recognized with respect to a transfer of property to his spouse under section 1041. The advice does not relate to a continuing action. Therefore, the taxpayer may not rely on the advice of the Service for transfers other than the transfer discussed in the taxpayer's written request for advice.

(g) *Effective date.* Section 6404(f) shall apply with respect to advice requested on or after January 1, 1989.

[T.D. 8254, 54 FR 21057, May 16, 1989. Redesignated at 55 FR 14245, Apr. 17, 1990]

§ 301.6405–1 Reports of refunds and credits.

Section 6405 requires that a report be made to the Joint Committee on Taxation of proposed refunds or credits in excess of $100,000 of any income tax (including any qualified State individual income tax collected by the Federal Government), war profits tax, excess profits tax, estate tax, or gift tax. An exception is provided under which refunds and credits made after July 1, 1972, and attributable to an election