

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

CC:DOM:IT&A:3
CAProhofsky SPR-252369-96

date: DEC 18 1996

to: National Director Customer Service Operations T:C:O

from: Deputy Assistant Chief Counsel (Income Tax & Accounting)
CC:DOM:IT&A

subject: Section 1615, Small Business Job Protection Act of 1996

We are writing in response to your memorandum of November 15, 1996, concerning § 1615 of the Small Business Job Protection Act of 1996, Pub. L. No. 104-188 (the Act).

Issues

You specifically requested clarification of two issues:

1) Does § 1615 of the Act disallow the exemption deductions for all personal exemptions, including primary and spouse, when the taxpayer identification number, or TIN, is incorrect or missing?

2) Does § 1615 of the Act require the Service to use "math error" procedures to work cases with incorrect primary TINs? That is, can the Service implement the law to disallow the exemption for the incorrect or missing dependent TINs only?

Conclusions

We conclude that the exemption deduction disallowance of § 151(e), which was added to the Internal Revenue Code by § 1615 of the Act, applies to the exemptions for the taxpayer and the taxpayer's spouse, as well as the exemption for dependents. We also conclude that the math error procedures are not mandatory.

Background

In 1996, Congress passed several provisions that expand the Service's authority to assess items summarily as "math errors" 1/

1/ We follow the accepted shorthand here, using "math error" for "mathematical and clerical

under § 6213(b) of the Code. One of these provisions is § 1615 of the Small Business Job Protection Act, which added §§ 151(e) and 6213(g)(2)(H) to the Internal Revenue Code. Section 151(e) disallows an exemption unless the TIN of the individual is included on the return. Section 6213(g)(2)(H) includes in the definition of math error the omission of a correct TIN required by § 151. However, you have indicated that for the upcoming filing season, the Service does not intend to use math error procedures to disallow personal exemption deductions for bad/missing "primary" (taxpayer) or "secondary" (spousal) TINs.

Personal Exemption Disallowance

Section 151(a) of the Code allows an individual taxpayer deductions for the exemptions provided in § 151(b) and § 151(c). Section 151(b) provides an exemption for the taxpayer and an additional exemption for the taxpayer's spouse if the taxpayer and the taxpayer's spouse do not file a joint return, and if the spouse, for the calendar year in which the taxable year of the taxpayer begins, has no gross income and is not the dependent of another taxpayer. Section 151(c) provides an additional exemption for each dependent subject to certain conditions.

Section 151(e) of the Code, which was added to the Internal Revenue Code by § 1615 of the Small Business Job Protection Act of 1996, Pub. L. No. 104-188, 110 Stat. 1755 (1996) (the Act), states that no exemption shall be allowed under § 151 with respect to any individual unless the TIN of such individual is included on the return claiming the exemption. However, the Conference Report accompanying the Act refers only to the dependency exemption, not the exemptions for the taxpayer and the taxpayer's spouse. H.R. Conf. Rep. No. 737, 104th Cong., 2d Sess. 320 (1996).

Although the Conference Report specifically refers to the dependency exemption provided by § 151(c) and does not refer to the personal exemptions for the taxpayer and the taxpayer's spouse provided by § 151(b), the language of § 151(e) is not so limited. Because the language of the statute is unambiguous, we do not think that the reference only to the dependency exemption in the legislative history limits the application of § 151(e) to the dependency exemption. See generally Sutherland, Statutory Construction §§ 48.01 and 48.02 (5th ed. 1992) (regarding the use of extrinsic aids generally and legislative history specifically in statutory construction). Accordingly, we conclude that § 151(e) applies to the exemptions provided by § 151(b) for the taxpayer and the taxpayer's spouse, as well as the exemption for dependents provided by § 151(c).

Math Error Procedures

Section 6213(g)(2)(H), added by Act § 1615, includes in the definition of mathematical or clerical error "an omission of a correct TIN required under section 21 (relating to expenses for household and dependent care services necessary for gainful employment) or section 151 (relating to allowance of deductions for personal exemptions)." This section will generally apply to returns filed with respect to the 1996 tax year.

Your second question is whether this provision requires the Service to use math error procedures for all cases regarding incorrect primary (and, presumably, secondary) TINs.

We do not interpret your question as involving a refusal to implement Act § 1615. For example, if, in the course of an examination, a return was found to lack a valid primary or secondary TIN, then a disallowance of the personal exemption deduction would result, along with any other adjustments that might be made. Rather, your question centers on whether the use of math error procedures is mandatory for all missing/invalid TIN adjustments.

Section 6213(b) provides an exception to the normal deficiency procedures for assessments arising out of mathematical or clerical errors. It provides:

If the taxpayer is notified that, on account of a mathematical or clerical error appearing on a return, an amount of tax in excess of that shown on the return is due, and that an assessment of the tax has been or will be made on the basis of what would have been the correct amount of tax but for the mathematical or clerical error, such notice shall not be considered as a notice of deficiency

There are two possible interpretations of the language of § 6213(b)(1). The first is that use of the math error procedure is mandatory for adjustments falling within its scope. Some inferential support for this reading can be found by contrasting the language of two other exceptions to the deficiency procedures: assessment of tentative or "quick" refunds under § 6213(b)(3), and assessment of amounts paid under § 6213(b)(4). Both provisions expressly state that the summary assessment procedure "may" be used.

The second interpretation is that, despite differences in language, the math error procedure is similar to the § 6213(b)(3) and (b)(4) procedures: an option the Service is authorized, but not required, to use. This interpretation is supported by the

statutory language of § 6213(b). It merely describes the consequences if the Service decides to issue a math error notice; it does not mandate that decision in the first place.

We believe that the second interpretation is more consistent with the function and purpose of the math error exception. The predecessor of § 6213(b)(1) dates back to the Revenue Act of 1926. The accompanying House committee report stated:

Subdivision (f), however, provides that in the case of a mere mathematical error appearing upon the face of the return, assessment of a tax due to such mathematical error may be made at any time, and that such assessment shall not be regarded as a deficiency notification.

H.R. Rep. No. 1, 69th Cong., 1st Sess. 11 (1926) (emphasis added).

This interpretation is also reinforced by the history behind legislation enacted in 1976, which clarified the definition of the types of errors covered by the procedure and provided for mandatory abatement at taxpayer request. See H.R. Rep. No. 658, 94th Cong., 1st Sess. 288 (1975); S. Rep. No. 938, 94th Cong., 2d Sess. 374 (1976). Describing prior law as "permitting" the Service to use the procedure, the Senate committee report pointed out the competing concerns of providing a less costly alternative to the deficiency procedure, in cases where most taxpayers do not dispute the Service's conclusions, while at the same time ensuring that the Service does not overstep its authority. S. Rep. No. 938 at 375. An interpretation that provides the Commissioner with some flexibility in the use of the math error procedure addresses both these concerns.

Recent changes to the definition of "math error" continue to describe present math error procedures in permissive, rather than mandatory, language. The legislative history of § 1615 of the Act states that the "IRS may summarily assess additional tax due as a result of a mathematical or clerical error" H.R. Conf. Rep. No. 737, 104th Cong., 2d Sess. 319 (1996) (emphasis added).

Thus, the math error procedure is merely a less costly, more streamlined means of assessing certain noncontroversial adjustments. It is not intended as a mandatory alternative to normal deficiency processing.

*

*

*

- 5 -

If you have any further questions, please contact me at 622-4810 or Cathy Prohovsky or Sandy Irving at 622-4930.

Lewis J. Fernandez