

CC-2006-002

November 22, 2005

Subject: Litigating Position Regarding the
Definition of Returns for Bankruptcy
Discharge Purposes

Cancel Date: Effective until Further
Notice

Purpose

This Notice provides guidance regarding the Service's position in contesting the dischargeability of a tax debt in bankruptcy on the basis that no return was filed when a taxpayer has signed and submitted a Form 870, Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment.

Background

The four part test set forth in *Beard v. Commissioner*, 82 T.C. 766, 777-78 (1984), *aff'd*, 793 F.2d 139 (6th Cir. 1986), is the proper test for determining what constitutes a valid return for purposes of the internal revenue laws or regulations. For a document to be considered a valid return, the document must:

- (1) purport to be a return;
- (2) be executed under penalties of perjury;
- (3) contain sufficient data to allow calculation of tax; and
- (4) represent an honest and reasonable attempt to satisfy the requirements of the tax law.

In Rev. Rul. 74-203, 1974-1 C.B. 330, the Service held that a Form 870 signed by the taxpayers, husband and wife, in response to a proposed substitute for return is a return of the taxpayers for purposes of section 6020(a) of the Internal Revenue Code. Relying upon Rev. Rul. 74-203, some bankruptcy courts have held that execution of a waiver may constitute the filing of a return for purposes of Bankruptcy Code section 523(a)(1)(B) even though the document is not executed under penalties of perjury. See, e.g., *In re Carapella*, 84 B.R. 779, 782 (Bankr. M.D. Fla. 1988) (Form 870); *In re Mathis*, 249 B.R. 324, 327 (S.D. Fla. 2000) (Form 4549, Income Tax Examination Changes); *In re Lowrie*, 162 B.R. 864, 867 (Bankr. D. Nev. 1994) (Form 1902-B, Report of Individual Income Tax Changes).

On September 12, 2005, the Service, in Rev. Rul. 2005-59, 2005-37 I.R.B. 505, revoked Rev. Rul. 74-203, and clarified when documents prepared or executed by the Service under section 6020, or waivers on assessment, constitute valid returns. Rev. Rul. 74-203 is inconsistent with *Beard* and the cases cited therein on what constitutes a return because a Form 870 does not purport to be a

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return and is not executed under penalties of perjury.

Position

Taxpayers are entitled to rely on Rev. Rul. 74-203 prior to its revocation. The Service will not contest the dischargeability of a tax debt in bankruptcy on the basis that no return was filed if a taxpayer submitted a signed Form 870 before the revocation of Rev. Rul. 74-203 on September 12, 2005. This position applies equally to the Form 1902, Report of Individual Income Tax Audit Changes (obsoleted 1988), and the Form 4549, Income Tax Examination Changes.

For bankruptcy cases filed on or after October 17, 2005, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) amends Bankruptcy Code section 523(a) to provide specifically that a "return" means a return that satisfies the requirements of nonbankruptcy law, including a return prepared under section 6020(a) or a written stipulation to a judgment or a final order entered by a nonbankruptcy tribunal, but not a return prepared under section 6020(b). In other words, this provision includes as returns documents meeting the *Beard* test, Rev. Rul. 2005-59 and signed stipulated decisions entered by nonbankruptcy courts, e.g., the Tax Court.

Questions regarding this Notice should be directed to Branch 2 of the Office of Assistant Chief Counsel (Collection, Bankruptcy and Summons), at (202) 622-3620.

/s/
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