

Department
of the
Treasury

Internal
Revenue
Service

Office of
Chief Counsel

Notice

CC-2007-005

February 4, 2007

Subject: Litigating Position for Returns Prepared under Section 6020(b) **Cancel Date:** Effective until further notice

Purpose

This Notice discusses procedures that should be followed in Tax Court cases in which the section 6651(a)(2) addition to tax has been determined on the basis of a substitute for return. This Notice also provides the Service's litigating position with respect to the section 6651(a)(2) addition to tax, as stated in Temp. Treas. Reg. § 301.6020-1T.

The temporary regulation describes a change in the Service's practices for preparing substitute income tax returns under section 6020(b). Because the procedures described in the regulation satisfy the requirements of section 6020(b), our office will defend the determination of the section 6651(a)(2) addition to tax for failure to pay the amount of tax reported due on a return in cases that follow the prescribed procedures.

It is essential that section 6020(b) returns be placed in evidence if the Tax Court is to find that the Service has met its burden of production under section 7491(c) and sustain the Service's addition to tax determination. In cases brought by nonfilers, the Tax Court will deny the section 6651(a)(2) addition to tax if a valid section 6020(b) return is not entered into the record. See, Wheeler v. Commissioner, 127 T.C. 14 (2006); Guthrie v. Commissioner, T.C. Memo. 2006-81; and Holmes v. Commissioner, T.C. Memo. 2006-80. This Notice updates and modifies CC-2004-009 (Jan. 22, 2004), which updated and modified CC-2003-019 (June 12, 2003).

Background

Section 6651(g) provides that a "return" that the Secretary prepares under section 6020(b) functions as a return filed by the taxpayer for purposes of determining the failure-to-pay addition to tax under section 6651(a)(2). The Tax Court has, on several occasions, held that the Service did not prepare returns that sufficed to impose the section 6651(a)(2) addition to tax under section 6020(b). Cabirac v. Commissioner, 120 T.C. 163 (2003), aff'd in an unpublished opinion, No. 03-3157 (3d Cir. Feb. 10, 2004); Rhodes v. Commissioner, T.C. Memo. 2003-133; Spurlock v. Commissioner, T.C. Memo. 2003-124. These returns were determined to be insufficient because they did not provide a basis on which to calculate the section 6651(a)(2) addition to tax and were not subscribed in accordance with section 6020(b)(2). Based on these

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adverse opinions, the Service changed its procedures, as detailed in CC-2004-009, and later in Temp. Treas. Reg. § 301.6020-1T.

Under section 7491(c), the Service has the burden of production for contested penalties and additions to tax. To meet this burden with respect to the section 6651(a)(2) addition to tax, the Service **must** offer as evidence the section 6020(b) return showing the unpaid tax as the basis on which the addition to tax is calculated. If the section 6020(b) return is not offered, respondent will not meet its burden of production, and the Tax Court will not sustain the addition to tax. See, *Wheeler v. Commissioner*, 127 T.C. 14 (2006); *Guthrie v. Commissioner*, T.C. Memo. 2006-81; and *Holmes v. Commissioner*, T.C. Memo. 2006-80.

Section 6020(b) Procedures

Temp. Treas. Reg. § 301.6020-1T provides that a document (or set of documents) signed by an authorized internal revenue officer or employee is a return under section 6020(b) if the document (or set of documents) (1) identifies the taxpayer by name and taxpayer identification number, (2) contains sufficient information from which to compute the taxpayer's tax liability, and (3) purports to be a return. A Form 13496, IRC Section 6020(b) Certification, or its automated counterpart, the IRC Section 6020(b) ASFR Certification, both described below, can be used to meet these requirements. A Form 13496, an ASFR Certification, or any other form that an authorized officer or employee signs and uses to identify a document (or set of documents) as a section 6020(b) return is, along with the identified document(s), a valid section 6020(b) return if the combined material contains all of the necessary information required by the temporary regulation to qualify as a section 6020(b) return.

The regulation also addresses the subscription requirement. The Service prepares and signs section 6020(b) returns either by hand or through automated means. To accommodate automated signatures, the regulation provides that the name and title of an internal revenue officer or employee appearing on a section 6020(b) return suffices as a subscription adopting the document as the taxpayer's return, whether the officer's or employee's name or title is handwritten, stamped, typed, printed, or otherwise mechanically affixed to the document, so long as the name was placed on the document to signify that the employee or officer adopted the document as a return for the taxpayer. The subscription, as well as the accompanying document or set of documents, may be in written or electronic form.

Form 13496

As described in IRM 20.1.2.1.4(9), to prepare the return under section 6020(b), the Service attaches a completed Form 13496 to other documents, which, when combined, satisfy each of the elements of a valid section 6020(b) return. Specifically, the package of documents consists of (1) the Form 13496, signed and dated; (2) Form 4549, Income Tax Examination Changes; and (3) Form 886-A, Explanation of Items. The latter two forms, which must be generated on or before the date the Form 13496 was signed, contain the information necessary to calculate the taxpayer's liability for the period and the amount of the failure-to-pay addition to tax.

Form 13496 was revised in October 2005 to eliminate, as part of a valid section 6020(b) return, the requirement that the tax return form or transcript of account form be attached to the Form 13496. A copy of the current Form 13496 (rev. 10-2005) is attached to this Notice.

ASFR Certification

In lieu of the Form 13496 package generally used by revenue agents or revenue officers, the Service may create an Automated Substitute for Return at certain campuses. In the ASFR process, an automated system generates a Letter 2566, 30 Day Proposed Assessment (SFR-01) 910 SC/CG, which includes the taxpayer's name, taxpayer identification number, and sufficient information to compute the taxpayer's tax liability. Contemporaneous with the generation of the Letter 2566, the Service's automated system electronically creates and stores a certification (the IRC Section 6020(b) ASFR Certification) certifying that the electronic data in the taxpayer's account on IDRS constitutes a valid section 6020(b) return as of that date. The certification includes the electronic signature of the Service employee authorized to sign the section 6020(b) return upon its creation. The resulting ASFR identifies the taxpayer's name, address, TIN, and computed liability for the tax period in question. Like the Form 13496 package, the automated package of certified information is a return under section 6020(b). A copy of a printout of the IRC Section 6020(b) ASFR Certification is attached to this Notice. If a printout of the ASFR certification or required documentation is missing from the administrative file, a copy must be obtained by contacting a Tax Examining Assistant at (978) 691-6729, (512) 460-1283, or (559) 454-6598. Personnel at any of these numbers can assist with information on any ASFR, regardless of its originating campus.

Litigating Position

Notice CC-2004-009 provides that this office will defend the section 6651(a)(2) addition to tax in cases in which the addition to tax is supported by a Form 13496 package conforming to the new procedures. The section 6651(a)(2) addition to tax should be defended in cases in which we can introduce into evidence a properly completed Form 13496 package as described in this Notice. In cases in which the former Form 13496 (prior to the current revised form, rev. 4-2005) was used to create the 6020(b) return and the appropriate tax return form or transcript of account is not attached, the section 6651(a)(2) addition to tax should be conceded.

In addition, the addition to tax in cases of an ASFR Certification package meeting the requirements described herein and dated on or after July 18, 2005, the effective date of Temp. Treas. Reg. § 301.6020-1T, should not be conceded. If, however, the Service has not prepared a Form 13496 or ASFR Certification package, the Office of Chief Counsel will not defend a document as constituting a section 6020(b) return in cases with facts that do not closely parallel those described in Millsap v. Commissioner, 91 T.C. 926 (1988), acq. in result in part, 1991-2 C.B. 1. Accordingly, the section 6651(a)(2) addition to tax will be conceded when the Service has not prepared, as a return, a document that (1) identifies the taxpayer, (2) provides a basis for the taxpayer's tax computation, and (3) is signed by a Service employee delegated the authority to sign section 6020(b) returns. The defense of any document that potentially meets these conditions must be coordinated with Branch 2, Administrative Provisions & Judicial Practice Division.

As stated above, the section 6020(b) return must be placed into evidence to satisfy the Service's burden of production under section 7491(c). The section 6020(b) return may be introduced in a number of ways. The simplest way is by stipulation of the parties, and, if necessary, through a motion to compel stipulation pursuant to T. C. Rule 91(f). If a motion for summary judgment or other dispositive motion is filed, the section 6020(b) return should accompany the motion as an exhibit to an affidavit or declaration authenticating the section 6020(b) return. At trial, the section 6020(b) return may be offered into evidence through a witness who is qualified to testify that it was made and kept in the course of the Service's

IRC Section 6020(b) Certification

Total pages certified as valid
section 6020(b) return

Tax year

Name of taxpayer

SSN / EIN

Address of taxpayer (Number, Street, City or Town, State, ZIP code)

Certification

The officer of the IRS identified below, authorized by Delegation Order 182, certifies the attached pages constitute a valid return under section 6020(b). This return consists of the following items:

1. Form 4549, Income Tax Examination Changes or equivalent;
2. Form 886-A, Explanation of Items, appropriate issue lead sheet or similar form;
3. This certification (Form 13496).

Pursuant to section 6651(g)(2), this certification, with attachments, shall be treated as the return filed by the taxpayer for purposes of determining the amount of the additions to tax under paragraphs (2) and (3) of section 6651(a).

IRS Authorization Data

Employee name

Title

Office

ID number

Signature

Date (mmdyyyy)

IRC Section 6020(b) ASFR Certification

Taxpayer Name: _____

Address: _____

SSN: _____ Tax Year: _____

The officer of the IRS identified below, authorized by Servicewide Delegation Order 5-2, certifies that he or she intends the electronic data contained as part of the taxpayer's account, and identified below, to constitute a valid return under section 6020(b). This data includes:

1. Taxpayer's name, address, tax identification number,
2. A computation of the taxpayer's tax liability for the tax period in question, and
3. The electronic version of this form with the electronic signature of the officer identified below.

This certification is created and stored electronically upon the creation of a Letter 2566, "30 Day Proposed Assessment (SFR-01) 910 SC/CG" .

Pursuant to section 6651(g)(2), this certification, and the data identified above, shall be treated as the return filed by the taxpayer for purposes of determining the amount of the additions to tax under paragraphs (2) and (3) of section 6651(a).

IRS AUTHORIZATION DATA

Employee Name	Title	Office	ID Number
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Signature [insert name of person delegated authority to sign a section 6020(b) return who intends the data to be a section 6020(b) return]	Date
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