

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

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to: Lisa Piehl
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subject: Application of Section 6501(c)(8) to a Deceased Taxpayer, Where the Executor of the Individual's Estate Fails to Furnish Information Required Under Section 6038D

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

ISSUES

Does section 6501(c)(8) operate to extend the period of limitations for the assessment of tax with respect to an estate's Form 1041 or Form 706 if the executor of the estate files the deceased individual's final Form 1040 and fails to provide information required to be furnished with the final Form 1040 under the provisions of section 6038D?

CONCLUSIONS

In the event of a failure to furnish information required under section 6038D, section 6501(c)(8) operates to suspend the period of limitations on assessment of any tax with respect to any return, event, or period, to which the undisclosed information relates. This would suspend the period of limitations for assessment for any tax reportable on an individual's final Form 1040 or an estate's Forms 1041 or 706 anytime there is a failure to furnish information, required under section 6038D, which relates to that return. Whether or not undisclosed information "relates" to a specific return will be a case specific inquiry.

FACTS

A taxpayer, who is a U.S. person, owns interests in specific foreign financial assets within the meaning of section 6038D for a specific tax year. Certain information about

these assets must be reported on a Form 8938 attached to the taxpayer's income tax return for the year at issue in accordance with section 6038D as well as the associated regulations, Forms, and Instructions. During the tax year for which this information is required to be reported, the taxpayer dies leaving gross assets sufficient to necessitate the filing of an estate tax return, Form 706.

Generally, the executor or administrator of the estate of a decedent, or other person charged with the property of a decedent, shall make the return of income required in respect of such decedent. See Treas. Reg. § 1.6012-3(b)(1). For the decedent's taxable year which ends with the date of his death, the return shall cover the period during which he was alive." Id. Along with filing the returns for the short tax year of the taxpayer on a Form 1040, the reporting rules also typically require the executor or administrator to file necessary returns on behalf of the individual's estate. See I.R.C. § 6018; Treas. Reg. § 20.6018-2.

Here, as in many instances, the same person, the executor of the estate, filed the required returns on behalf of both the deceased individual, and the estate. This filing requirement included reporting of certain foreign assets under section 6038D. While the executor filed the taxpayer's Form 1040, he did not furnish the information required to be attached to that return under section 6038D. The executor also filed the estate's Forms 1041 and 706 as required. The executor failed to include the foreign assets on the Form 706 as a part of the gross estate. The executor also omitted income from the foreign assets on the taxpayer's final Form 1040 and the estate's Form 1041. The ordinary three-year assessment period has closed on each of these returns.

LAW AND ANALYSIS

Congress has provided several disincentives for failures to furnish information required to be reported under section 6038D (among other similar provisions). This includes significant penalties, penalty enhancements, and the extension of the applicable period of limitations to assess tax. See e.g., I.R.C. §§ 6038D(d), 6662(j), and 6501(c)(8).

Section 6501(c)(8) provides that:

In the case of any information which is required to be reported to the Secretary pursuant to an election under section 1295(b) or under section 1298(f), 6038, 6038A, 6038B, 6038D, 6046, 6046A, or 6048, the time for assessment of any tax imposed by this title with respect to any tax return, event, or period to which such information relates shall not expire before the date which is 3 years after the date on which the Secretary is furnished the information required to be reported under such section.

The operative language provides that the period of limitations is suspended for the assessment of "any tax imposed by this title with respect to any tax return, event, or period to which such information relates." The phrase "any tax imposed by this title" is

broad and as a general rule would include any income tax, estate tax, gift tax, or excise tax as well as any related interest or penalties. See I.R.C. §§ 6671, 6601(e)(1).

The phrase “with respect to any return, event, or period to which such information relates” is likewise very broad.¹ “Any return” should generally include, at the very least, any return which the Secretary requires to be filed by a taxpayer under the authority in chapter 61 of the Code. Similarly, any “event, or period” should be interpreted to include taxes resulting from a discrete transaction or event as well as any taxes arising with respect to a specific taxable period. This broad language is modified with the phrase “to which such information relates.” Therefore in order to trigger the section 6501(c)(8) suspension, the unfurnished information must “relate” to the “return, event, or period” with respect to which the tax will be assessed.

Whether information “relates” to a specific “return, event, or period” will generally require a case-specific inquiry. However, in many cases, the failure of an executor to report a foreign financial asset, which is required to be reported under section 6038D (or any of the other listed provisions), will hold open the period of limitations on assessment of any tax required to be shown on the individual’s Form 1040 or the estate’s Form 1041 or Form 706, to the extent that the unfurnished information “relates” to such return.

In the facts provided, the executor filed a Form 1040 and a Form 1041, each of which omitted income derived from the foreign financial asset. Similarly, the executor filed a Form 706 which omitted the foreign financial asset from the gross estate. The information required to be reported under section 6038D would have helped the Service to identify each of these omitted items. At the very least, the information would have identifies a likely source of income, during the relevant time period, and assets held at or near the time of death. On these facts, it seems clear that the unfurnished information would relate to each of these three returns because it identified a source of income reportable on the Form 1040 and the Form 1041 and an item which should have been included in the gross estate on the Form 706.

It should also be noted that there is a reasonable cause defense under section 6501(c)(8). If the failure to furnish the required information is due to reasonable cause, and not to willful neglect, then the extension of the period of limitations is restricted to

¹ This advice deals only with the application of the current version of section 6501(c)(8) (following the enactment of the HIRE Act which made several changes to the section effective March 18, 2010). This most recent amendment applies to returns filed after March 18, 2010, or returns filed on or before that date if the section 6501 period (determined without regard to such amendments) for assessment of such taxes had not expired as of that date. See §§ 513(c) and (d) of the Hiring Incentives to Restore Employment (HIRE) Act, Pub. L. No. 111-147, 124 Stat. 112 (2010). The addition of the phrase “tax return” in section 6501(c)(8) clarified that the extended period of limitations applies to a taxpayer’s entire return and is not limited to the specific items to which the information that should have been reported relates. See THE STAFF OF THE JOINT COMMITTEE ON TAXATION, TECHNICAL EXPLANATION OF THE REVENUE PROVISIONS CONTAINED IN SENATE AMENDMENT 3310, THE HIRE ACT, UNDER CONSIDERATION IN THE SENATE, JCX-4-10 (February 23, 2010).

taxes resulting from adjustments to the item(s) to which the information relates (this limits the analysis to any “item” to which the information relates as opposed to any “return, event, or period”). In the case of reasonable cause, adjustments should only be made to unrelated items to the extent necessary to effectuate the adjustments made to related items.² Whether the unfurnished information relates to the item(s) at issue is a determination which will need to be made based on the circumstances of each case.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

[REDACTED]

[REDACTED]

[REDACTED]

² Generally, penalties related to or resulting from the unfurnished information or understatements related to the unfurnished information will be a “related” item. See JOINT COMMITTEE ON TAXATION, TECHNICAL EXPLANATION OF THE REVENUE PROVISIONS OF THE SENATE AMENDMENT TO THE HOUSE AMENDMENT TO THE SENATE AMENDMENT TO H.R. 1586, SCHEDULED FOR CONSIDERATION BY THE HOUSE OF REPRESENTATIVES ON AUGUST 10, 2010 (JCX-46-10) (“For this purpose, related items include (1) adjustments made to tax consequences claimed on the return with respect to the transaction that was subject of the information return, (2) adjustments to any item to the extent the item is affected by the transaction even if it is otherwise unrelated to the transaction, and (3) interest and penalties that are related to the transaction or the adjustments made to the tax consequences.”).

[REDACTED]

[REDACTED]

[REDACTED]

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Please call (202) 317-6845 if you have any further questions.

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