



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224
October 27, 1999

OFFICE OF
CHIEF COUNSEL

Number: **200004017**
Release Date: 1/28/2000
UILC: 6212.00-00

CC:DOM:FS:PROC

INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

MEMORANDUM FOR DISTRICT COUNSEL, HOUSTON DISTRICT,
CC:MSR:HOU

FROM: ASSISTANT CHIEF COUNSEL (FIELD SERVICE) CC:DOM:FS

SUBJECT:

This Field Service Advice responds to your memorandum dated August 13, 1999. Field Service Advice is not binding on Examination or Appeals and is not a final case determination. This document is not to be cited as precedent.

LEGEND

Taxpayer	=
Year 1	=
Year 2	=
Year 3	=
Year 4	=
Day 1	=
Day 2	=
Day 3	=
Day 4	=
Day 5	=
Day 6	=

ISSUE

Is a notice of deficiency defective if the Service made a determination without using the taxpayer's return where the Service was apparently unaware of the recently filed return.

CONCLUSION

No. A notice of deficiency is not defective solely because it indicates that the Service failed to take account of the taxpayer's return provided it is based on information recorded in the Service's official records and data bases. With respect to the

determination requirement, a notice of deficiency is only invalid when the notice facially reveals that the Commissioner failed to make a determination.

FACTS

The taxpayer was a non-filer. The service center conducted an examination of her liability for Year 1. The examination determined that the taxpayer had sufficient taxable income to require that she file a return for Year 1. This determination was based on information returns filed with the Service reflecting wage, interest and stock sale income.

The notice of deficiency was mailed to the taxpayer on Day 1 of Year 4. This notice of deficiency was based on the determination that the taxpayer had not filed a return for Year 1.

The Service received the taxpayer's Year 1 return on or about Day 6 of Year 3. The transcript of account has a 976 code, posted duplicate return, dated Day 6 of Year 3. The transcript also has a 599 code, tax return secured, dated Day 5 of Year 3. The taxpayer attached a return receipt from the service center indicating that the Service received a package from her on Day 6 of Year 3. The return itself does not have a date received stamped on it.

The posting dates for the above transcript entries appear to have been after the date the notice of deficiency was issued. The 976 code was posted during the fourth week of Year 4. The 599 code was posted during the fourteenth week of year 4. The notice of deficiency was issued during the second week of Year 4 (Day 1 of Year 4).

The return that was filed by the taxpayer was processed by the Service and the tax shown on it was assessed on Day 3 of Year 4. An overpayment was applied to the taxpayer's liability for the Year 2. A handwritten notation on the first page of the return says, "Accepted #708, Day 4 of Year 4."

A petition was filed by the taxpayer with the United States Tax Court on Day 2 of year 4. In this petition, the taxpayer claims that the notice of deficiency is "facially invalid" because it did not reduce the deficiency by the tax shown on the return. The petition further asserts that the notice of deficiency is in error because the deficiency does not meet the definition contained in I.R.C. § 6211(a).

The petition does not challenge the Court's jurisdiction. Additionally, the petition does not cite the case of Scar v. Commissioner, 814 F.2d 1363 (9th Cir. 1987).

LAW AND ANALYSIS

The Tax Court's jurisdiction to redetermine a deficiency depends upon the issuance of a valid notice of deficiency and a timely filed petition. Levitt v. Commissioner, 97 T.C.

437, 441 (1991). Section 6212(a) of the Code expressly authorizes respondent, after determining a deficiency, to send a notice of deficiency to the taxpayer by certified or registered mail. A notice of deficiency is legally sufficient so long as it advises the taxpayer that the Commissioner has determined a deficiency against him and specifies the year and the amount of the deficiency, or provides information necessary to compute the amount. Geiselman v. United States, 961 F.2d 1 (1st Cir. 1992); and Donley v. Commissioner, 791 F.2d 383, 384-85 (5th Cir. 1986).

Section 6211(a) of the Code provides, in part, that the term “deficiency” means the amount by which the income tax imposed by the Code exceeds the amount shown as the tax by the taxpayer upon his tax return. A deficiency notice may be valid even if it contains error “where the taxpayer has not been misled as to the proper year involved or the amounts in controversy.” Estate of Davenport v. Commissioner, 184 F.3d 1176, 1183 (D.C. Colo. 1999).

Because a taxpayer is entitled to a de novo proceeding in the Tax Court upon the filing of a timely petition for review, the Tax Court has repeatedly stated the general rule that courts will not look behind a notice of deficiency to question the Commissioner’s motives and procedures leading to a determination. Barrett v. Commissioner, 78 A.F.T.R. 2d (RIA) 5159 (9th Cir. 1996). See also Greenberg’s Express, Inc. v. Commissioner, 62 T.C. 324, 327 (1974).

In her petition, petitioner claims that the notice of deficiency is “facially invalid” because it did not reduce the deficiency by the tax shown on the return. The petition further asserts that the notice of deficiency is in error because the deficiency does not meet the definition contained in I.R.C. § 6211(a). These arguments are similar to those made in Scar, *supra*.

In Scar, the taxpayers received a notice of deficiency that disallowed a loss deduction from a partnership with which the taxpayers had no connection and the notice computed a tax using the then highest marginal rate. The taxpayers argued that the Commissioner failed to determine a deficiency as contemplated under I.R.C. § 6212(a). The Tax Court held the notice of deficiency to be valid but the Ninth Circuit Court of Appeals reversed, concluding that the Commissioner must consider information relating to a particular taxpayer before it can be said that the Commissioner determined a deficiency with respect to that taxpayer. Scar, 814 F.2d at 1368. With this standard in mind, the court found the notice of deficiency to be invalid under I.R.C. § 6212(a) because the notice on its face revealed that the Commissioner had not reviewed information relating to the particular taxpayer or otherwise made a determination respecting the taxpayers’ liability for the particular taxable year.

Petitioner’s chief contention appears to be that respondent is required to examine petitioner’s actual income tax return (or a copy thereof) and cannot rely solely on information contained in respondent’s records in determining a deficiency. This argument is similar to the one raised by the taxpayer in Kong v. Commissioner, T.C.

Memo. 1990-480. In that case, respondent contended that it relied on the taxpayer's administrative file, which also included a transcript of account, in computing the tax due in the notice of deficiency. The Tax Court, however, found that respondent disregarded the transcript of account in determining the deficiency. In short, the Tax Court held that respondent was not prohibited from using information stored in its databases, but was prohibited from misusing or disregarding such stored information. See Whittington v. Commissioner, T.C. Memo. 1999-279, 78 T.C.M. (CCH) 339, 342. See also Toll v. Commissioner, 1991 U.S. App. LEXIS 17529 (9th Cir. 1991), an unpublished opinion that found the Service ignored the adjusted gross income information available from the partnership return and the computer data bases. In Toll, the Ninth Circuit found that "failure to review the returns is enough to result in a jurisdictionally fatal defect." Toll, 1991 U.S. App. LEXIS at 17536. In note 3, the court clarified this statement by indicating that review of pertinent information in electronic form or other form may be a substitute for looking at the return itself.

The criteria for defending Scar type cases is set forth in LGM TL-3, The Determination Requirement for Statutory Notices of Deficiency Under I.R.C. § 6212(a) (January 18, 1988). The Service position, as stated below, is that it is not necessary for the Service to examine a return as long as the Service relies on information duly recorded in its official records and data bases.

The Ninth Circuit's opinion states that the "determination" process requires the Service to have examined or reviewed the taxpayer's "return." It is unclear whether the court meant literally that the examiner or statutory notice issuer must have the taxpayer's physical return in hand or whether the Service may rely on taxpayer return information duly recorded in the Service's official records and data bases. To the extent that the Ninth Circuit intended the former, the Service strongly disagrees. Such a requirement would be unwarranted and unduly restrictive of the Service's efforts to computerize tax return information.

Significantly, the courts applying Scar have limited the rule established in that case to its facts. See Whittington, 78 T.C.M. at 341. The rule set forth in Scar applies in the narrow set of circumstances where the notice of deficiency on its face reveals that respondent failed to make a determination. See Meserve Drilling Partners v. Commissioner, 152 F.3d 1181, 1183 n.3 (9th Cir. 1998) (in Scar, because the Commissioner had not considered information that related to the taxpayer, the notice was invalid; subsequently, however, the 9th Circuit explained that Scar was limited to those instances in which the "notice of deficiency reveals on its face that the Commissioner failed to make a determination").

The crucial issue in determining the validity of a notice of deficiency is whether the notice of deficiency reveals on its face that respondent failed to consider information that relates to the petitioner in particular. A presumption exists that the Commissioner made a determination if the notice reveals that the deficiency was based on information

relating to the taxpayer. Clapp v. Commissioner, 875 F.2d 1396, 1402 (9th Cir. 1989). If the attachments to the notice of deficiency identify petitioner's employer and other reliable sources of income, the respondent will be considered to have considered information that related to petitioner. See Fraser v. Commissioner, T.C. Memo. 1997-182 (“[n]othing on the face of the notice of deficiency indicates that respondent failed to make a determination with respect to petitioner's tax liability”); and Farr v. Commissioner, 74 A.F.T.R. 2d (RIA) 6909 (9th Cir. 1994) (the Commissioner issued the petitioner a facially valid notice of deficiency indicating that petitioner had failed to file a return and failed to report specific amounts of income). Similarly, a notice will be valid if it specifies the amount of the petitioners' deductions even though the Commissioner issued the notice of deficiency without access to the petitioners' actual tax return. Richards v. Commissioner, 82 A.F.T.R. 2d (RIA) 7240 (9th Cir. 1998).

In the instant case, respondent's notice of deficiency included a detailed compilation of petitioner's wages, stock sales, and interest, all reported by third parties. Petitioner does not dispute that the amounts appearing on the notice of deficiency are the same as the amounts appearing on her return. Petitioner's main objection seems to be that the Service erred in not taking into account her stock bases, as reflected in her return, in determining gain.

Notwithstanding this omission, respondent's determination complies with Scar and its progeny. The determination was supported by substantial evidence regarding the taxpayer, namely the information gathered from third party sources contained in the official records and data bases. See, for example, Whittington, 78 T.C.M. at 342 (the RTVUE records allowed respondent to consider the specific information and reconstruct petitioner's return for the purposes of the exam). Accordingly, we conclude that the notice of deficiency was valid here.

We note that the petitioner's return was filed 25 days prior to the issuance of the notice of deficiency. In the analogous area dealing with the last known address requirement, it has been held that the Service must be given time to process the new return. In Rose v. Commissioner, T.C. Memo. 1992-739, the Tax Court held that the notice was valid even though it was mailed 46 days after the taxpayer had filed a tax return which reflected her new address. Similarly, in Baptist v. Commissioner, T.C. Memo. 1990-280, the notice was valid though mailed 67 days after the taxpayer had filed a tax return with the new address. The courts generally follow the self-imposed deadlines of the Service in Rev. Proc. 90-18, 1990-1 C.B. 491. Under that revenue procedure, a new address will generally be considered “properly processed” 45 days after receipt, with certain detailed exceptions. Based on the self-imposed guidelines, we feel the Service should not be held to have knowledge of information contained in a return when it has had only had 25 days to process the return, as here.

We further note that the transcript of account here indicates that the petitioner's return was not processed at the time the notice of deficiency was issued. This is further supported by the fact that the examiner would have checked the transcript prior to

issuance of the notice of deficiency in order to ascertain whether there had been a change in the last known address. We maintain that the Service should not be held to have knowledge of information contained in an unprocessed return within the first 45 days of the receipt of that return. The focus is on the information available to the IRS at the time it issues the notice of deficiency rather than on what in fact may be the taxpayer's correct address at that time. See Armstrong v. Commissioner, 15 F.3d 970, 974 (10th Cir. 1994); and Ward v. Commissioner, 907 F.2d 517, 521 (5th Cir. 1990).

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS



If you have any questions concerning the above, please call.

DEBORAH A. BUTLER
Assistant Chief Counsel
(Field Service)

By: _____
BLAISE G. DUSENBERRY
Assistant to the Branch Chief
Procedural Branch
Field Service Division

cc: Regional Counsel, CC:MSR
Assistant Regional Counsel (TL), CC:MSR