

Office of Chief Counsel
Internal Revenue Service
Memorandum

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to: Area Counsel
(Small Business/Self-Employed: Area 3)
Attn: Alan Cooper

from: Tiffany P. Smith
Assistant to the Branch Chief
Branch 1
(Procedure & Administration)

subject: Faxed Forms 872

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

ISSUE

Can a Form 872, Consent to Extend the Time to Assess Tax, be accepted via facsimile transmission (fax)¹?

CONCLUSION

Forms 872 received by fax may be legally sufficient because fax signatures may be sufficient, with the proper safeguards, to authenticate and verify consents and other documents under I.R.C. § 6061 and 6065. Although we do not recommend that the Service establish procedures that *routinely* permit the faxing of waivers of restrictions on assessment to the Service, that does not mean that consents signed by taxpayers or

¹ In telecommunications, facsimile, also called fax or telefax, is an electronic method of transmission and reproduction of documents by wire or radio wave. Modern fax machines are designed to scan printed textual and graphic material and then transmit the information through the telephone network to similar machines, where documents are reproduced in close to their original form.

their representatives and received by fax are invalid. The Service should be able, in extraordinary circumstances, to accept fax signatures on Forms 872.

FACTS

The taxpayer's statute of limitation for assessment of tax for 1999 would normally expire on December 20, 2003. The case file for the 1999 year contains a Form 872 dated November 24, 2003, with a fax signature of taxpayer's valid power of attorney, and executed by an IRS group manager extending the statute of limitations to December 31, 2004. The case file for the 1999 year also contains a Form 872 dated September 15, 2004, with original signatures of the power of attorney and an IRS group manager extending the statute of limitations to December 31, 2005.

The taxpayer's statute of limitation for assessment of tax for 2000 would normally expire on August 16, 2004. The case file for the 2000 year contains a Form 872 dated November 24, 2003, with a fax signature of taxpayer's valid power of attorney, and executed by an IRS group manager extending the statute of limitations to December 31, 2004. The case file for the 2000 year also contains a Form 872 dated September 15, 2004, with original signatures of the power of attorney and an IRS group manager extending the statute of limitations to December 31, 2005.

Taxpayer's 1999 and 2000 tax years were sent to Appeals. Appeals returned the case to Examination questioning the validity of the consents secured by Examination.

In May 2003, the Commissioner of Internal Revenue adopted a policy statement entitled "Use of Fax and Signature Stamps for Taxpayer Submissions." One of the policy statements adopted was "[c]onsents to extend the statute of limitations for assessing tax (Form 872, SS-10, and other consent forms) **will not** be accepted via fax in normal operations." (emphasis in the original).

LAW

I.R.C. § 6061(a) provides, as a general rule, that any return, statement, or other document required to be made under any provision of the internal revenue laws or regulations shall be signed in accordance with forms or regulations prescribed by the Secretary.

I.R.C. § 6065 specifies that, except as otherwise provided by the Secretary, any return, declaration, statement, or other document required to be made under any provision of the internal revenue laws or regulations shall contain or be verified by a written declaration that it is made under the penalties of perjury.

I.R.C. §§ 6061 and 6065 require signatures to authenticate and verify the return or other document submitted. The signature authenticates the return by identifying the document as the signer's. The signature operates to verify the return by confirming the truth, correctness, and completeness of the document.

Treas. Reg. ' 301.6061-1(b) provides that the Secretary (Commissioner, through delegation) may prescribe in forms, instructions, or other appropriate guidance the method of signing any return, statement, or other document required to be made under any provision of the internal revenue laws or regulations.

I.R.C. ' 6501(c)(4) provides that the period of limitations on assessment of any tax, except estate tax, may be extended to a date beyond the normal three-year period on assessment by an agreement in writing between the taxpayer and the Commissioner's delegate made before the expiration of either the normal period of assessment or the date agreed on in a prior agreement between the parties.

I.R.C. ' 6213(a) mandates that until a notice of deficiency has been mailed to the taxpayer, the government may not make any assessment of the deficiency, nor begin or prosecute a levy or a court proceeding for collection of the deficiency, and then not until the 90-day (or 150-day) period has expired. If the taxpayer has filed a petition with the Tax Court within that period, no assessment and no levy or proceeding for collection may be instituted until the decision of the Tax Court has become final. I.R.C. ' 6213(d) provides, however, the taxpayer may waive the restrictions imposed by I.R.C. ' 6213(a) on the assessment and collection of a deficiency in federal tax at any time regardless of whether a notice of deficiency has been issued. I.R.C. ' 6213(d) does not prescribe any particular form of waiver of restriction, but states that the waiver must be a signed notice in writing.

ANALYSIS

An examining agent may request the taxpayer to execute a waiver of restrictions on assessment. The forms used include Form 872, entitled "Consent to Extend the Time to Assess Tax." This Form must be signed by the taxpayer or his representative and by the appropriate IRS official.

It had traditionally been the Service's position that I.R.C. ' ' 6061 and 6065 contemplate an original signature. See Rev. Proc. 78-29, 1978-2 C.B. 526, ' 7.02 ("All taxpayer signatures on forms to be filed with the Internal Revenue Service must be original signatures, affixed subsequent to the reproduction process."). The Code, however, does not define the term "signature" but rather subsumes the common law definition. At common law, the critical element of authentication is the signer's act of adopting the document being "signed." Thus, the requirement for an "original" signature can be satisfied by a faxed copy of a taxpayer's manual signature if the taxpayer adopts the faxed copy as his or her signature for purposes of the return. The critical administrative task for the Service is to determine whether the taxpayer or his representative intended to adopt the copy. In adopting a particular signature method, the Service must be satisfied that the signature reliably authenticates and verifies the return or other documents submitted. Reliability is the crucial factor.

Because waivers of assessment frequently wind up in litigation, are time sensitive, and often involve taxpayers who have not been compliant and have outstanding tax liabilities, the Policy Statement on Fax Signatures does not recommend that the Service establish procedures that *routinely* permit the faxing of waivers of restrictions on assessment to the Service. That does not mean, however, that consents signed by taxpayers or their representative and received by fax are invalid. Forms 872 received by fax may be legally sufficient because fax signatures may be sufficient, with the proper safeguards, to authenticate and verify consents and other documents under I.R.C. § 6061 and 6065. The Service should be able, in extraordinary circumstances, to accept fax signatures on Forms 872.

Under these circumstances, where there is no question regarding the authenticity of the power of attorney's signature, we believe that the fax signatures by the taxpayer's power of attorney are valid for purposes of executing the Form 872.

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

Please call (202) 622-4910 if you have any further questions.