

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

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to: Associate Area Counsel (Salt Lake City)  
(Small Business/Self-Employed)

from: Blaise G. Dusenberry  
Acting Deputy Assistant Chief Counsel  
Administrative Provisions and Judicial Practice  
(Procedure and Administration)

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subject: Request for Reconsideration of Chief Counsel Opinion on Zero Return Procedures

This Chief Counsel Advice responds to your memorandum dated September 12, 2006, regarding treatment of zero returns. In particular, you ask the National Office to reconsider its earlier position that the Internal Revenue Service (Service) implement one penalty procedure for zero return cases in the Ninth Circuit Court of Appeals and another for cases in other circuit courts of appeal. You also recommend that the National Office implement a nationwide policy treating zero returns as invalid for purposes of issuing notices of deficiency. This advice may not be used or cited as precedent.

ISSUE

How should the Service treat returns that contain zeros on all of the lines necessary to compute tax liability?

CONCLUSION

The Service should institute a nationwide policy treating zero returns as invalid for purposes of issuing notices of deficiency, and as frivolous returns under the Frivolous Return Program set forth in IRM 4.10.12. The Service should also adopt a uniform

position nationwide of asserting the failure to file penalty under section 6651(a)(1) of the Internal Revenue Code (Code) as the primary position and the section 6662 penalty as the alternate position. The Service should also assert the frivolous return penalty under section 6702 of the Code.

## DISCUSSION

### ZERO RETURNS

Some taxpayers attempt to avoid their federal income tax liability by filing a return that:

- 1) reports no income,
- 2) shows zeros on lines necessary to compute tax liability, and
- 3) contains tax protestor or frivolous arguments or a Form W-2 or other information return that shows taxable income but no tax liability (a “zero return”).

These taxpayers typically rely on one or more frivolous arguments to support the position that wage or other income is not subject to tax. See, e.g., Rev. Rul. 2004-31, 2004-1 C.B. 617 and Notice 2004-22, 2004-1 C.B. 632. A taxpayer filing a zero return often requests a refund of all taxes withheld.

There is no authority under U.S. law that permits a taxpayer that has taxable income to avoid income tax by filing a zero return. The claim that the filing of a zero return will allow a taxpayer to avoid income tax liability, or will permit a refund of any tax withheld by an employer, is frivolous. Section 61 of the Code provides that gross income includes all income from whatever source derived, including compensation for services. Adjustments to income, deductions, and credits must be in accordance with the provisions of the Code, Treasury Regulations and other applicable federal law. Section 6011 of the Code provides that any person liable for any tax shall make a return when required by Treasury Regulations, and that returns must be in accordance with Treasury regulations and IRS forms. Section 1.6011-1(b) of the Treasury Regulations provides, in relevant part, that each taxpayer should set forth fully and clearly the information required to be included on the return. Section 6012 of the Code identifies the persons who are required to file income tax returns.

A valid return is a document that: (1) purports to be a return, (2) is executed under penalties of perjury, (3) reports sufficient data to calculate the tax liability, and (4) most importantly, constitutes an honest and reasonable attempt to satisfy the requirements of the law. *Beard v. Commissioner*, 82 T.C. 766 (1984), *aff'd*, 793 F.2d 139 (6<sup>th</sup> Cir. 1986).

In *United States v. Long*, 618 F.2d 74 (9<sup>th</sup> Cir. 1980), the Ninth Circuit held that a return containing only zeros was a return for purposes of section 7203<sup>1</sup> because it contained

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<sup>1</sup> I.R.C. § 7203, entitled “Willful failure to file return, supply information, or pay tax,” provides:

information relating to the taxpayer's income from which the tax could be computed. The Tax Court, acknowledging overwhelming authority contrary to *Long*, has held that a zero return is not a valid return. *Cabirac v. Commissioner*, 120 T.C. 163 (2003). See also *Taylor v. United States*, 87 AFTR2d 2001-2518, 2001-2 USTC ¶ 50,479, 2001 U.S. Dist. LEXIS 11497 (D.D.C. 2001) (to be valid, a return must contain sufficient data to allow calculation of tax); *United States v. Edelson*, 604 F.2d 232, 234 (3d Cir. 1979) (tax forms that do not contain financial information upon which a taxpayer's tax liability can be determined do not constitute returns); *United States v. Smith*, 618 F.2d 280 (5th Cir. 1980) (Form 1040 which contained nothing but zeros and constitutional arguments not return for purposes of I.R.C. § 7203); *United States v. Mosel*, 738 F.2d 157 (6th Cir. 1984) (Form 1040 listing zero income and no tax liability not return for purposes of I.R.C. § 7203); *United States v. Moore*, 627 F.2d 830 (7th Cir. 1980) (Form 1040 in which defendant filled in the lines calling for numerical information with "none" and de minimus interest and dividend income not honest and reasonable attempt to supply information required by the tax code); *United States v. Grabinski*, 727 F.2d 681, 687 (8th Cir. 1984) (Form 1040 asserting taxable income of zero and constitutional objections and tax protestor material not return as a matter of law); *United States v. Rickman*, 638 F.2d 182 (10th Cir. 1980) (1975 Form 1040 containing zeros on lines 9 to 18 and 20 not return for purposes of I.R.C. § 7203).

## PENALTIES

Recently, in *Coulton v. Commissioner*, T.C. Memo. 2005-199, a case appealable to the Ninth Circuit, the Tax Court in a zero return case upheld the imposition of the addition to tax under section 6651(a)(1).<sup>2</sup> The court distinguished *Long*, adopting the Service's

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Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$25,000 (\$100,000 in the case of a corporation), or imprisoned not more than 1 year, or both, together with the costs of prosecution. In the case of any person with respect to whom there is a failure to pay any estimated tax, this section shall not apply to such person with respect to such failure if there is no addition to tax under section 6654 or 6655 with respect to such failure. In the case of a willful violation of any provision of section 60501, the first sentence of this section shall be applied by substituting "felony" for "misdemeanor" and "5 years" for "1 year".

<sup>2</sup> I.R.C. § 6501, entitled Limitations on assessment and collection, provides in subsection (a) the general rule that "[e]xcept as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) or, if the tax is payable by stamp, at any time after such tax became due and before the expiration of 3 years after the date on which any part of such tax was paid, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period. For purposes of this chapter, the term "return" means the return required to be filed by the taxpayer (and does not include a return of any person from whom the taxpayer has received an item of income, gain, loss, deduction, or credit)."

argument that *Long* was not on point because it was a criminal penalty case under section 7203, rather than a civil penalty case under section 6651(a)(1).

In the past, the Office of Chief Counsel's approach to zero returns and other similar documents has been to process them as valid returns until *Long* is overruled. More recently, in a Service Center Advice from James C. Gibbons to your office dated May 23, 2005, we advised that the priority in which the Service asserts the penalties under sections 6651(a)(1) and 6662<sup>3</sup> should be based on the taxpayer's apparent circuit court jurisdiction. The Advice recommended that for taxpayers with addresses in the Ninth Circuit, the Service should assert penalties under section 6662 as the primary position and section 6651(a)(1) in the alternative. The Advice also recommended that for taxpayers with addresses in all of the other states, the Service should assert the penalties in the reverse order, with section 6651(a)(1) in the primary position and section 6662 in the alternative. The Advice noted that the Service should not assert section 6662 penalties where a return was not filed. See Section 6664(b), which provides that "[t]he penalties under this part shall only apply only in cases where a return of tax is filed ... ."

Based on the Tax Court's decision to impose the section 6651(a) failure to file penalty in zero return cases appealable to the Ninth Circuit, see *Coulton*, the National Office believes it is time to reconsider its previous position on the proper handling of zero returns by the Service. For these purposes, we define a zero return as a return that show zeros on lines necessary to compute tax liability, and a) contains tax protestor or frivolous arguments, or b) a Form W-2 or other information return that shows taxable income.<sup>4</sup>

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<sup>3</sup> I.R.C. § 6662, entitled Imposition of accuracy-related penalty on underpayments, provides in subsections (a) and (b), in part, as follows:

(a) Imposition of penalty.--If this section applies to any portion of an underpayment of tax required to be shown on a return, there shall be added to the tax an amount equal to 20 percent of the portion of the underpayment to which this section applies.

(b) Portion of underpayment to which section applies.--This section shall apply to the portion of any underpayment which is attributable to 1 or more of the following:

- (1) Negligence or disregard of rules or regulations.
- (2) Any substantial understatement of income tax.
- (3) Any substantial valuation misstatement under chapter 1.
- (4) Any substantial overstatement of pension liabilities.
- (5) Any substantial estate or gift tax valuation understatement.

<sup>4</sup> Attaching informational returns to an invalid Form 1040 does not make an otherwise invalid return valid. *Turner v. Commissioner*, T.C. Memo. 2004-251, citing *Kartrude v. Commissioner*, 925 F.2d 1379, 1384 (11<sup>th</sup> Cir. 1991); *Reiff v. Commissioner*, 77 T.C. 1169, 1177-78 (1981).

By defining zero returns for purposes of this memorandum in this manner, we are distinguishing situations where the taxpayer submits a Form 1040 leaving all lines blank with a Form W-2 or other information return showing taxable income attached, or submits a Form 1040 that contains zeros on lines necessary to compute tax liability, but with no protestor language, Form W-2 or other information return attached.

Accordingly, we recommend that the Service adopt a uniform position nationwide of asserting the failure to file penalty under section 6651(a)(1) as the primary position and the section 6662 penalty as the alternate position in notices of deficiency.

Finally, the Service should also assert other penalties if the facts and circumstances support its imposition, such as the fraud penalties under sections 6663 and 6651(f) and the estimated tax penalty under section 6654.

## FRIVOLOUS RETURNS

Section 6702 of the Code imposes a separate \$500 penalty when a taxpayer files a frivolous income tax return. The penalty is imposed on a document that purports to be an income tax return, but that:

- (1) does not contain information on which the substantial correctness of the self-assessment may be judged, or
- (2) contains information that on its face indicates that the self-assessment is substantially incorrect.

The taxpayer is subject to the section 6702 penalty if the submission meets the above criteria and the conduct is due to:

- (1) a position that is frivolous, or
- (2) a desire (which appears on the purported return) to delay or impede the administration of the tax laws.

We believe that a zero return is a frivolous income tax return within the meaning of section 6702(a). Such a document purports to be a return. A return with zeros on lines necessary to compute tax liability “does not contain information on which the substantial correctness of the self-assessment may be judged.” A zero return with a Form W-2 or other information return that shows taxable income “contains information that on its face indicates that the self-assessment is substantially incorrect.” Finally, a zero return with tax protestor language attached asserts “a position that is frivolous.”

Accordingly, we conclude that the Service should treat zero returns as invalid frivolous returns under the Frivolous Return Program described in IRM 4.10.12 (March 1, 2006), and institute a nationwide policy treating zero returns as invalid for purposes of issuing notices of deficiency. These returns should not be processed. See IRM 4.10.12.1.1(1)4, 4.10.12.1.3(4). Instead, the Service should follow the procedures set forth in IRM 4.10.12.4.4.

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) 622-7419 if you have any further questions.