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From:

Sent: Thursday, June 27, 2013 9:54:56 AM

To:

Cc:

Subject: FW: adjustment of status/exemptions (no ITIN)

Hi

You asked us what filing status should be used for a taxpayer who filed a joint return with his nonresident alien spouse who did not have a proper taxpayer identification number. In your case, after the tax years in question, but before the examination of the returns in question, the nonresident alien spouse got a social security number. Because she was a nonresident alien during the tax years in question, she and her husband can file a joint return for those years only if they both make an election under section 6013(g). See section 6013(a)(1), (g). The election can be made with a joint amended return up until the expiration of the refund statute of limitations (within three years of the time the return is filed or two years of the time the tax is paid). Treas. Reg. 1.6013-6(a)(4)(i). Because the refund statute is still open for the tax years in question, , the taxpayers could file amended joint returns for , making a section 6013(g) election for each year. The TPW can use her SSN for the purpose of making the joint amended returns because an individual who has an SSN can use the SSN for all tax purposes, even if, for instance, the individual had previously been issued an ITIN or becomes a nonresident alien. See Treas. Reg. 301.6109-1(d)(4). If for some reason the taxpayers choose not to make a section 6013(g) election for a tax year in which they were married, TPH's filing status should be married filing separately unless he can establish head of household status under section 2 of the Code. See section 2(b)(2)(B) (providing that for purposes of head of household status, a taxpayer married to a nonresident alien is not considered to be married); see also Lee v. Commissioner, T.C. Memo. 1980-195 (holding that the petitioner, who was married to a nonresident alien, was not entitled to file as head of household, and did not contend that he elected to file a joint return under section 6013(g), was required to file as a married individual filing separately).

If you have any other questions or if I can be of further assistance, please don't hesitate to contact me.

Thanks,