



OFFICE OF  
CHIEF COUNSEL

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

JUN 15 2001

CC:PA:APJP:2:RBTaylor  
WTA-N-122135-01

MEMORANDUM FOR DOUG ROGERS, HQ PROGRAM MANAGER (OFFICE OF  
PENALTY AND INTEREST) S:C:CP:RC:P  
Attn: Bob Curran

FROM: Assistant Chief Counsel (Administrative Provisions and Judicial  
Practice) CC:PA:APJP

SUBJECT: Questions on IRC section 6651

This memorandum is in response to your request for advice dated April 18, 2001. In your request for advice you asked us to answer several questions regarding the administration of the additions to tax under section 6651 of the Internal Revenue Code. The questions in your request for advice were provided as problems, which we have answered in the discussion section below. Underlying your problems are the following issues:

Issues

1. Whether the addition to tax under section 6651(a)(2) or section 6651(a)(3) is applicable to the failure to pay the tax owed from a mathematical error adjustment.
2. Whether the addition to tax under section 6651(a)(2) or section 6651(a)(3) is applicable to the failure to pay the tax owed as shown on an amended return.
3. Whether the additions to tax under section 6651(a)(1) and section 6651(a)(2) must be abated and refunded (if paid) when a later adjustment results in the reduction or overpayment of the underlying tax.

Conclusions

1. The addition to tax under section 6651(a)(3), for failure to pay tax as required to be shown on the return which is not shown, is applicable to the failure to pay the tax owed from a mathematical error adjustment.
2. The addition to tax under section 6651(a)(2) may not be imposed with respect to unpaid tax shown on an amended return. The addition to tax under section 6651(a)(3), for failure to pay tax required to be shown on the return which is not shown, is applicable to the failure to pay the tax shown on an amended return.

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3. The additions to tax imposed under section 6651(a)(1) and 6651(a)(2) must be abated and refunded (if paid) in the amount related to the adjustment that reduces the underlying tax.<sup>1</sup>

#### Discussion

Section 6651(a)(1) imposes an addition to tax for failure to file a return on the date prescribed (determined with regard to any extension of time for filing), unless it is shown that such failure is due to reasonable cause and not due to willful neglect. The amount of the addition to tax is 5 percent of the amount required to be shown if the failure is for not more than one month, with an additional 5 percent for each additional month or fraction thereof during which such failure continues, not exceeding 25 percent in the aggregate.<sup>2</sup>

Section 6651(a)(2) imposes a penalty for failure to pay the amount shown as tax on the return on or before the due date prescribed for payment of such tax (with regard to extensions), unless it is shown that such failure is due to reasonable cause and not due to willful neglect. The amount of the addition to tax is 0.5 percent of the amount of unpaid tax if the failure is for not more than one month, with an additional 0.5 percent for each additional month or fraction thereof during which the failure continues, not exceeding 25 percent in the aggregate. Section 6651(c)(2) provides a special rule that if the amount required to be shown as tax on a return is less than the amount shown as tax on such return, the addition under section 6651(a)(2) must be applied by substituting the lower amount.

Section 6651(a)(3) imposes a penalty for failure to pay any amount in respect of any tax required to be shown on a return, which is not so shown, within 21 calendar days from the date of notice and demand therefor (10 business days if the amount for which such notice and demand is made equals or exceeds \$100,000), unless it is shown that such failure is due to reasonable cause and not due to willful neglect. The amount of the addition to tax is 0.5 percent of the amount of unpaid tax if the failure is for not more than one month, with an additional 0.5 percent for each additional month or fraction thereof during which the failure continues, not exceeding 25 percent in the aggregate.

The significant difference between the addition to tax under section 6651(a)(2) and the addition to tax under section 6651(a)(3) is that under section 6651(a)(2) the penalty begins to accrue from the due date of the payment (generally the due date of the

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<sup>1</sup> It is beyond the scope of this memorandum to address all the prerequisites to payment of a refund and it is assumed that all prerequisites not discussed herein are met.

<sup>2</sup> Under section 6651(c)(1), the amount of the addition to tax under section 6651(a)(1) is reduced by the amount of the addition to tax under section 6651(a)(2) for any month in which both additions are imposed.

return), while under section 6651(a)(3) the penalty begins to accrue after notice and demand for payment. Thus, the addition to tax under section 6651(a)(3) is more favorable to taxpayers because the penalty begins to accrue only after notice and demand for payment; it does not relate back to the return due date.

#### Issue 1: Mathematical Errors

It is our understanding that the Service's computer systems are imposing the addition to tax under section 6651(a)(2), for failure to pay amounts shown on the return, on any unpaid tax corresponding to a mathematical error adjustment. It is our opinion that the computer systems are incorrectly imposing the addition to tax under section 6651(a)(2) on mathematical error adjustments because any tax owed from a mathematical error adjustment is not an amount shown as tax on a return.

Section 6213(b)(1) provides that if a taxpayer is notified that, on account of a mathematical or clerical error appearing on the return, an amount of tax in excess of that shown on the return is due, and that an assessment of tax that has been or will be made on the basis of what would have been the correct amount of tax but for the mathematical or clerical error, such notice will not be considered as a notice of deficiency. Additionally, section 6213(b)(2)(A) provides that the Service must abate any mathematical error assessment upon request from the taxpayer, and any reassessment with respect to the abatement must be made subject to deficiency procedures.

As provided under section 6213(b)(1), an adjustment of tax from a mathematical error is an amount of tax in excess of that shown on the return.<sup>3</sup> The addition to tax under section 6651(a)(3) is applicable to the failure to pay tax required to be shown on a return which is not so shown. It is evident from these two code sections that the addition to tax under section 6651(a)(3) is the correct addition to tax to impose on the failure to pay an amount owed from a mathematical error adjustment because both code sections contain similar definitions, as emphasized above. A mathematical error adjustment is an amount of tax in excess of that shown on the return; thus, the addition under section 6651(a)(2) cannot be imposed on a mathematical error adjustment because the addition is imposed only on amounts shown on the return.

It could be argued that the addition to tax under section 6651(a)(2) should apply to mathematical errors because a mathematical error is the amount that the taxpayer intended to show on the return. However, this argument is without merit because 6213(b)(1) specifically states that a mathematical error is an amount in excess of that shown on the return; section 6651(a)(2) is only imposed on amounts shown on the return, not amounts intended to be shown on the return. Additionally, if that argument

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<sup>3</sup> A mathematical error adjustment is considered a deficiency as defined under section 6511. However, section 6213 exempts a mathematical error adjustment from the deficiency procedures, unless the taxpayer requests abatement of the adjustment and the Service wants to reassess the amount.

were adopted, a taxpayer could take advantage of section 6213(b)(2)(A) and force the Service to issue a notice of deficiency just for the purpose of avoiding the addition to tax under section 6651(a)(2). Nothing in the Code suggests Congress intended such results.

**Problem:** Taxpayer timely files a 1040 U.S. Individual Income Tax Return for the 2000 tax year showing a refund of \$500. The Service makes a mathematical error adjustment in the amount of \$900. Taxpayer is sent a notice and demand for payment in the amount of \$400 on May 21, 2001. How is the addition to tax for failure to pay the amount owed as a result of the mathematical error adjustment calculated?

**Answer:** The addition to tax for failure to pay the amount owed as a result of the mathematical error adjustment is calculated under section 6651(a)(3). Thus, the addition to tax will be 0.5 percent of \$400 (or unpaid amount if subsequent payments are made) per month beginning on June 12, 2001, the 22<sup>nd</sup> day from the date of the notice and demand sent to the taxpayer for the payment of the \$400.

In conclusion, the addition to tax under section 6651(a)(3), for failure to pay tax required to be shown on the return which is not shown, is applicable to a mathematical error adjustment, not the addition to tax under section 6651(a)(2), for failure to pay the tax shown on the return, because the tax owed from a mathematical error is an amount required to be shown on the return which is not shown on the return.

### Issue 2: Amended Returns with Additional Tax

It is our understanding the Service's computer systems are applying the addition to tax under section 6651(a)(3), for amounts required to be shown on the return that are not shown, on any unpaid tax from an amended return filed by a taxpayer. It is our opinion that the computer systems are correctly calculating the addition to tax under section 6651(a)(3) on the failure to pay tax owed from amended returns because the adjustment based on an amended return is an amount required to be shown on the return which is not shown.

In general, an amended return is not part of the original return; a "return" is usually considered the original return. See Badaracco v. Commissioner, 464 U.S. 386 (1984); Zellerbach Paper Co. v. Helvering, 293 U.S. 1972 (1934) (holding that, for purposes of the statute of limitations under section 6501, return means original return, not an amended return). In Stewart v. Commissioner, 66 T.C. 54 (1976), the court held that the fraud penalty under section 6653 is calculated using the difference between the correct tax and the tax shown on the original return, any corrections on an amended return are irrelevant. Additionally, Rev. Rul. 75-453, 1975-2 C.B. 495, provides that the additions to tax under sections 6651(a)(1) and 6651(a)(2) cannot be imposed on tax owed from an amended return filed after a timely filed original return, but section

6651(a)(3) can be imposed. Thus, based on Rev. Rul. 75-453 and the above cases, the computer systems are correctly applying the addition to tax under section 6651(a)(3) on tax owed from an amended return.

**Problem:** Taxpayer timely files a 1040 U.S. Individual Income Tax Return for the 2000 tax year showing a refund of \$500. A year later, taxpayer files an amended return showing \$1100 in tax owed. How is the addition to tax for failure to pay the amount shown on the amended return calculated?

**Answer:** The addition to tax for failure to pay the amount shown on the amended return is calculated under section 6651(a)(3). Thus, the addition to tax will be 0.5 percent of \$1100 (or unpaid amount if subsequent payments are made) per month beginning on the 22<sup>nd</sup> day from the date the notice and demand sent to the taxpayer for the payment of \$1100.

In conclusion, the addition to tax under section 6651(a)(3), for failure to pay tax required to be shown on the return which is not shown, is imposed on the failure to pay tax owed from an amended return because the additional amount from the amended return is an amount required to be shown on the original return which was not shown.

### Issue 3: Reduction in Tax

It is our understanding that the Service's computer systems are abating and refunding (if paid) additions to tax under section 6651(a)(1), for failure to file a timely return, when a subsequent adjustment results in a reduction or an overpayment of the underlying tax. However, the computer systems are not abating additions to tax under section 6651(a)(2), for failure to pay the tax shown on the return, when a subsequent adjustment results in a reduction or an overpayment of the underlying tax. It is our opinion the computer systems are correctly administering the abatement of the addition to tax under section 6651(a)(1), but are incorrectly failing to abate the addition to tax under section 6651(a)(2).

As mentioned above, the penalty under section 6651(a)(1) is computed on the "amount required to be shown as tax on [the] return." The penalty under section 6651(a)(2) is computed on the "amount shown as tax on [the] return." In addition, section 6651(c)(2) specifically provides that if the "amount required to be shown as tax on a return" is less than the amount shown as tax on such return, the addition to tax under section 6651(a)(2) shall be applied by substituting the lower amount. The "amount required to be shown as tax on [the] return" is the tax correctly adjusted. Thus, adjustments reducing the underlying tax call for adjustments to the addition to tax imposed by section 6651(a)(1) and section 6651(a)(2) because both additions are imposed on the amount required to be shown on the return. The amount of the adjustments to the additions to tax under sections 6651(a)(1) and 6651(a)(2) must be in correlation to the reduction of the underlying tax liability.

**Problem:** Taxpayer files a 1040 U.S. Individual Income Tax Return for the 2000 tax year on June 18, 2001 with a payment of \$300 for the tax owed as shown on the return. The Service assesses an addition to tax under section 6651(a)(1) in the amount of \$100 for failure to file the return timely. The Service assesses an addition to tax under section 6651(a)(2) in the amount of \$4.50 for failure to pay the tax timely. The Service later determines that taxpayer has a \$1000 overpayment and adjusts the tax liability accordingly. When the taxpayer is issued the \$1000 refund, are the additions to tax under sections 6651(a)(1) and 6651(a)(2) abated and refunded to taxpayer if taxpayer paid these amounts?

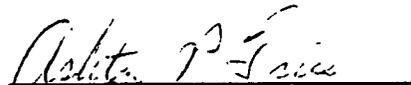
**Answer:** The addition to tax under section 6651(a)(1) in the amount of \$100 and the addition tax under section 6651(a)(2) in the amount of \$4.50, plus any accrued amount, must be abated and, if the amount was paid by the taxpayer, then the amount must be refunded.<sup>4</sup>

In conclusion, when an adjustment to tax results in a favorable adjustment to a taxpayer (a reduction or overpayment of the underlying tax) any addition to tax under section 6651(a)(1) must be reduced or abated accordingly. Furthermore, section 6651(c)(2) requires any addition to tax under section 6651(a)(2) also to be reduced or abated accordingly.

If you have any questions or concerns regarding this response, please contact Brad Taylor at (202)622-8445.

CURTIS G. WILSON

By:



Ashton P. Trice

Senior Technician Reviewer, Branch 2

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<sup>4</sup> Again, this memorandum assumes that all other prerequisites to a refund are satisfied. This memorandum also assumes that the taxpayer does not have any other outstanding liabilities on the account that must be paid. Any refund amount is generally offset by other amounts owed on the account.