



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

OFFICE OF
CHIEF COUNSEL

CC:CT:NO-124749-02

JMTosh

MAY 28 2002

MEMORANDUM FOR CHIEF, CRIMINAL INVESTIGATION

FROM:

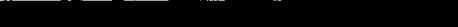
Nancy J. Jardini

Division Counsel/Associate Chief Counsel (Criminal Tax)

SUBJECT:

Charging Alternatives For Electronically Filed Returns Where
Form 8453 Is Not Available To Prove Signature

This responds to your request for guidance regarding how electronically filed tax return cases prior to the 2001 filing season should be charged where a Form 8453, "U.S. Individual Income Tax Declaration for Electronic Filing," was required to be filed in order to complete the return but is unavailable to the Service.



Background

Prior to the 2001 filing season, a taxpayer who filed a tax return electronically ("ELF return") was required to file a Form 8453, signed under penalty of perjury, separately from the electronically filed return.¹ The taxpayer's signature on the Form 8453 completes the ELF return and has the same legal significance as his/her signature on the Form 1040, "U.S. Individual Income Tax Return." See IRM 3.42.5.21 and Figures 3.42.5-27 and 28 (enclosed). There is no substitute or waiver provided for unavailable

¹ The Form 8453 must be mailed to the IRS within three days of the electronic filing; however, the Service Centers do not always verify the receipt of the Form 8453 before issuing a refund.

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Forms 8453.² See IRM 3.42.5.21.9.1.3. Starting with the 2001 filing season, electronic returns do not require Forms 8453; rather, a Personal Identification Number ("PIN") is selected by the taxpayer who is filing electronically. See IRM 3.42.5.21.1.1. The self-selected PIN satisfies the signature requirement for ELF returns. Id.

ANALYSIS

A taxpayer who files a false ELF return faces the same penalties as a taxpayer who files a return manually. Therefore, a taxpayer who files a false ELF return is subject to, among other charges, prosecution under I.R.C. § 7206(1), which prohibits any person from (1) making and subscribing to any return, statement, or other document, which was false as to a material matter, (2) which contained or was verified by a written declaration made under the penalties of perjury, (3) to which he did not believe to be true and correct as to every material matter, and (4) did so willfully and with the specific intent to violate the law. See IRC § 7206(1). The signature requirement is easily satisfied for ELF returns filed after 2000 and where the taxpayer has used a self-selected PIN number. However, the signature requirement becomes more difficult to prove when the ELF return was filed prior to the 2001 filing season and the Form 8453 cannot be located. If the taxpayer never filed the Form 8453, or if the form cannot be located, an IRC § 7206(1) prosecution would fail. In these situations, other prosecution vehicles should be considered (i.e., IRC §§ 7201, 7203, 18 U.S.C. §§ 286, 287, and/or 1001).

While no court has specifically analyzed the government's decision to charge filing false returns pursuant to 18 U.S.C. § 287 instead of I.R.C. § 7206(1), case law supports the use of 18 U.S.C. § 287 for prosecuting false electronically filed tax returns. See United States v. Noah, 130 F.3d 490 (1st Cir. 1997)(evidence sufficient to find defendant, not third party, filed false refund claims electronically).³ Furthermore, both 18 U.S.C. § 287

² I.R.C. § 6061 provides that the Secretary of the Treasury "shall develop procedures for the acceptance of signatures in digital or other electronic form. Until such time as such procedures are in place, the Secretary may (A) waive the requirement of a signature for; or (B) provide for alternative methods of signing or subscribing a particular type or class of return..." See I.R.C. § 6061(b). The statute further provides any return filed and signed pursuant to any alternative method adopted under subsection (b) shall be treated as signed or subscribed. See I.R.C. § 6061(c).

³ See also United States v. Tilford, 224 F.3d 865 (6th Cir. 2000)(defendant, who assisted a co-conspirator in filing false tax returns electronically, pleaded guilty to aiding and abetting in the filing of a false claim in violation of 18 U.S.C. § 287); United States
(continued...)

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and 18 U.S.C. § 1001 cases must be reviewed and approved by the Tax Division. However, the Tax Division has noted that although Title 26 offenses are the preferred vehicle for criminal tax prosecutions, charges for offenses arising under the internal revenue laws have never been limited to that title. See Department of Justice, Tax Division, Directive No. 99, n.3 (March 30, 1993). It should not be overlooked that filing a false document may constitute an affirmative act of evasion, thus supporting a charge under IRC § 7201.

Conclusion

Prosecutions involving false ELF returns prior to 2000 require a Form 8453 as proof the taxpayer signed the return under penalties of perjury and to prove the tax return is complete. Therefore, proving such cases pursuant to I.R.C. § 7206(1) may be difficult, since that statute requires proof of the taxpayer's signature. [REDACTED]

DP

Should you have any questions or wish to discuss the matter further, please feel free to contact me on (202) 622-4460 or Jennifer Tosh of my staff on (202) 622-4470.

Attachment

cc: Area Counsel (Criminal Tax)

³(...continued)

for filing false income tax returns electronically); United States v. Guy, 1999 U.S. App. LEXIS 32244 (6th Cir. Dec. 7, 1999)(unpublished)(defendant convicted for electronically filing false tax returns under 18 U.S.C. § 287); United States v. Alvarez, 1998 U.S. App. LEXIS 26116 (10th Cir. Oct. 15, 1998)(unpublished).

PROOF

Declaration Control Number (DCN) 00 - - - 2 IRS Use Only—Do not write or stamp in this space.

8453-OL U.S. Individual Income Tax Declaration for an IRS e-file On-Line Return OMB No 1545-1307

Department of the Treasury Internal Revenue Service **2001**

For the year January 1–December 31, 2001
▶ See instructions on back.

Use the IRS label. Otherwise, please print or type.

<p>L Your first name and initial</p> <p>A Last name</p> <p>B If a joint return, spouse's first name and initial</p> <p>E Last name</p> <p>L Home address (number and street). If a P.O. box, see instructions.</p> <p>H Apt. no.</p> <p>E City, town or post office, state, and ZIP code</p>	<p>Your social security number</p> <p>Spouse's social security number</p> <p>Important! You must enter your SSN(s) above</p> <p>Daytime phone number</p>
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Part I Tax Return Information (Whole dollars only)

1 Adjusted gross income (Form 1040, line 33; Form 1040A, line 19; Form 1040EZ, line 4)	1	
2 Total tax (Form 1040, line 57; Form 1040A, line 35; Form 1040EZ, line 10)	2	
3 Federal income tax withheld (Form 1040, line 66; Form 1040A, line 36; Form 1040EZ, line 7)	3	
4 Refund (Form 1040, line 67a; Form 1040A, line 42a; Form 1040EZ, line 11a)	4	
5 Amount you owe (Form 1040, line 68; Form 1040A, line 44; Form 1040EZ, line 12). See instructions	5	

Part II Declaration of Taxpayer

6a I consent that my refund be directly deposited as designated in the electronic portion of my 2001 Federal income tax return. If I have filed a joint return, this is an irrevocable appointment of the other spouse as an agent to receive the refund.

b I do not want direct deposit of my refund or I am not receiving a refund.

c I authorize the U.S. Treasury and its designated Financial Agent to initiate an ACH debit (electronic withdrawal) entry to the financial institution account indicated in the tax preparation software for payment of my Federal taxes owed on this return and/or a payment of estimated tax. I further understand that this authorization may apply to subsequent Federal tax payments that I direct to be debited through the Electronic Federal Tax Payment System (EFTPS). In order for me to initiate subsequent payments, I request that the IRS send me a personal identification number (PIN) to access EFTPS. This authorization is to remain in full force and effect until I notify the U.S. Treasury Financial Agent to terminate the authorization. To revoke a payment, I must contact the U.S. Treasury Financial Agent at 1-888-353-4637 no later than 2 business days prior to the payment (settlement) date. I also authorize the financial institutions involved in the processing of the electronic payment of taxes to receive confidential information necessary to answer inquiries and resolve issues related to the payment.

If I have filed a balance due return, I understand that if the IRS does not receive full and timely payment of my tax liability, I will remain liable for the tax liability and all applicable interest and penalties. If I have filed a joint Federal and state tax return and there is an error on my state return, I understand my Federal return will be rejected.

Under penalties of perjury, I declare that the information I have given my intermediate service provider and/or transmitter and the amounts in Part I above agree with the amounts on the corresponding lines of the electronic portion of my 2001 Federal income tax return. To the best of my knowledge and belief, my return is true, correct, and complete.

Sign Here ▶ Date ▶ Spouse's signature. If a joint return, both must sign. Date

For Paperwork Reduction Act Notice, see back of form. Cat. No. 15007C Form 8453-OL (2001)

Figure 3.42.5-28