

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

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date: June 7, 2007

to: Jimmy L. Smith
Director, Submissions Processing

from: Carol Nachman *Carol Nachman*
Senior Technician Reviewer, Branch 2
(Procedure & Administration)

subject: Rejection of On-Line Returns

This responds to your memorandum dated April 26, 2007, regarding treatment of on-line returns.

ISSUE

Whether the Internal Revenue Service (IRS) can reject on-line returns from taxpayers that have not submitted the Form 8453-OL, U.S. Individual Income Tax Declaration for an IRS On-line e-File Return, for two consecutive years?

CONCLUSION

The IRS should not reject on-line returns from taxpayers who have not submitted the Form 8453-OL for the past two consecutive years. Rather, the IRS should not complete processing on-line returns or issue refunds until the Form 8453-OL for the year of return is received.



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FACTUAL BACKGROUND

A Form 8453-OL is used by a taxpayer electronically filing an individual income tax return through an intermediate service provider or transmitter when the taxpayer does not use a self-select PIN. The Form 8453-OL is used to:

1. Authenticate the electronic portion of the Form 1040, U.S. Individual Income Tax Return; Form 1040A, U.S. Individual Income Tax Return; Form 1040EZ, Income Tax Return for Single Filers and Joint Filers With No Dependents; or Form 1040EZ-T, Claim for Refund of Federal Telephone Excise Tax;

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2. Send any required paper forms¹ to the IRS, or
3. Provide consent to directly deposit any refund and/or authorize an electronic funds withdrawal for payment of federal taxes owed and/or a payment of estimated tax.

The instructions to Form 8453-OL provide that the form should be mailed to the IRS on the next working day after the filer receives acknowledgment from the intermediate service provider and/or transmitter that the IRS has accepted the electronically filed return or request for refund.

Under IRS procedures, Form 8453 or 8453-OL is required for every electronic return, unless it is signed electronically. See IRM 3.42.5.16.2(2) (10-01-2006). Moreover, if a taxpayer does not sign his or her return electronically, the return is not considered complete, and therefore filed, until the Submission Processing Center receives a complete and signed Form 8453 or Form 8453-OL. See IRM 3.42.5.16(3) (10-01-2006).

A number of processing problems can arise, however, when a taxpayer files his or her return online. First, notwithstanding the procedures in the IRM, electronic returns are processed and refunds are issued regardless of whether the Form 8453-OL is received for the associated Form 1040. Second, there is a time lag between the taxpayer's electronic submission and the IRS' receipt of the electronic return, and the IRS's receipt

¹ These paper forms include:

- Form 1098-C, Contributions of Motor Vehicles, Boats, and Airplanes (or acceptable documentation/required Donor Documentation)
- Form 3115, Application for Change in Accounting Method
- Form 3468, Investment Credit (if Historic Structure Certificate is required)
- Form 4136, Credit for Federal Tax Paid on Fuels (if certificate and/or reseller statement is required)
- Form 5713, International Boycott Report
- Form 8283, Noncash Charitable Contributions, Section A (if statements) required) or Section B, Donated Property
- Form 8332, Release of Claim to Exemption for Child of Divorced or Separated Parents (or similar statement)
- Form 8858, Information Return of U.S. Persons With Respect to Foreign Disregarded Entities
- Form 8864, Biodiesel and Renewable Diesel Fuels Credit (if certificate and/or reseller statement is required)
- Form 8885, Health Coverage Tax Credit
- Schedule D-1, Continuation Sheet for Schedule D (Form 1040) (or acceptable substitute) - if taxpayer elects not to include their transactions on the electronic STCGL/LTCGL Records

The current use of the Form 8453-OL to transmit these documents should not prevent implementation of our recommendation that the IRS discontinue use of the Form 8453-OL to sign on-line returns. Counsel is exploring other avenues to receive these documents, including use of the PIN included with the electronic return to cover the paper forms that are sent in separately with Form 8453 as an alternative method of signing under IRC section 6061(b)(1)(B) or the creation of a new transmittal document for these forms while requiring a PIN for the associated Form 1040.

of the Form 8453-OL. The IRS usually receives Form 8453-OL well after it receives the electronic return. As a result, the IRS is unable to verify that the return is executed under the penalties of perjury upon receipt of the electronic return.

During processing year 2006, approximately 5.7 million Forms 8453-OL were required to be filed. At the end of calendar year 2006, however, approximately 1.35 million Forms 8453-OL remained outstanding. Despite the lack of the Form 8453-OL, refunds were issued for the majority of these returns.

DISCUSSION

Not every document filed with the IRS qualifies as a valid return under the Internal Revenue Code and case law. Status as a valid return is important for a number of reasons. Only a valid return begins the running of the statute of limitations on assessment under I.R.C. § 6501(a) and avoids the delinquency penalty for failure to file a return under I.R.C. § 6651(a)(1).

In *Beard v. Commissioner*, 82 T.C. 766 (1984), *aff'd*, 793 F.2d 139 (6th Cir. 1986), the Tax Court announced a widely cited and well established four prong test used to determine a return's validity, known as the substantial compliance standard. Under this test:

First, there must be sufficient data to calculate tax liability; second, the document must purport to be a return; third, there must be an honest and reasonable attempt to satisfy the requirements of the tax law; and fourth, the taxpayer must execute the return under penalties of perjury.

82 T.C. at 777.

The substantial compliance standard compliments the statutory requirements governing the validity of returns. I.R.C. § 6065 requires that a return shall "contain or be verified by a written declaration that it is made under the penalties of perjury."

The paper Form 1040 contains a jurat² to facilitate taxpayers' compliance with the verification requirement of section 6065. For taxpayers who file their tax returns electronically, the same jurat is provided on the e-form, which may be signed electronically using a PIN, or on a paper Form 8453-OL, which must be signed and mailed to the IRS on the next working day after the filer has received acknowledgment from his or her intermediate service provider or transmitter that the IRS has accepted the electronically filed return, or request for refund. By signing the jurat included on a Form 1040 or Form 8453-OL, a taxpayer satisfies the requirement to execute a return under the penalties of perjury.

² The jurat reads: "Under penalties of perjury, I declare that I have examined this return and accompanying schedules and statements, and to the best of my knowledge and belief, they are true, correct, and complete." See *Williams v. Commissioner*, 114 T.C. 136 (2000).

In cases where taxpayers fail to file the Form 8453-OL, the taxpayer's return neither complies with I.R.C. § 6065 nor satisfies the fourth prong of the substantial compliance standard because it was not signed under penalties of perjury. Therefore, the return is invalid, does not start the running of the statute of limitations on assessment under I.R.C. § 6501(a) and, if not cured, triggers the delinquency penalty for failure to file a return under I.R.C. § 6651(a)(1).



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Please contact Michael Hara at (202) 622-7419 if you have any questions regarding this memorandum.

³ As the Form 8453-OL instructions now read, the taxpayer who wishes to comply during the current filing season would be discouraged from completing a Form 8453-OL. That is, if the return were rejected, there of course would be no acknowledgment that the return was accepted, so there would be no incentive for the taxpayer to complete and mail the Form 8453-OL.

⁴ See Treasury Inspector General for Tax Administration, *Requiring Personal Identification Numbers for Electronically Filed Returns Could Improve Tax Administration and Reduce Costs*, 2006-30-001 (September 2006); Treasury Inspector General for Tax Administration, *The Internal Revenue Service Continues to Pay Tax Refunds on E-Filed Tax Returns Prior to Ensuring a Signature Document is Processed*, 2002-42-202 (September 2002). TIGTA estimates the Service could save \$1.8 million in processing costs if it eliminated the Form 8453.