

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

CC:PA:B6
POSTS-106192-08

Third Party Communication: None
Date of Communication: Not Applicable

UILC: 6212.00-00

date: March 28, 2008

to: Susan E. Haskell
Policy Analyst
(Wage & Investment)

from: Jason A. Spitzer
STR, Branch 6
(Procedure & Administration)

subject: Statutory Notices of Deficiency Issued In Conjunction With ASFRs

This Legal Advice responds to your request for assistance. This advice may not be used or cited as precedent.

Background

A request for assistance was received by our office on February 11, 2008. The request posed a list of questions asking when, under various scenarios, a first or second Statutory Notice of Deficiency should be issued to a taxpayer who failed to file an initial income tax return and subsequently was subject to a substitute for return ("ASFR") that the Service filed on the taxpayer's behalf. Below is the list of questions we received that present different proposals dealing with ASFRs.

Questions and Answers

Proposal 1: [REDACTED]

[REDACTED] The ASFR Statutory Notice is issued prior to the receipt of a tax return and reflects the IRS's proposed assessment if no return is filed. The Service will add unreported income of \$100.00 or more to the return once the 90-day period for the original Statutory Notice of Deficiency has expired.

- a. Question: Is the Service required to issue a second statutory notice of deficiency once the return is received and a determination is made that income has not been reported?

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- i. **Answer:** The Service is not *required* to issue a second notice of deficiency but may do so if the taxpayer has not yet petitioned the Tax Court and/or the 90 period has run. See Treas. Reg. § 301.6212-1(c); Jones v. United States, 889 F.2d 1448, 1450-1451 (5th Cir. 1989); Gmelin v. Commissioner, T.C. Memo. 1988-338. However, the issuance of a second notice prior to the expiration of the 90 days does not rescind the first. This is because rescission of a notice of deficiency is discretionary on the part of the Secretary and such notice of deficiency will be rescinded only with taxpayer consent. Rev. Proc. 98-54, 1998-2 C.B. 531, section 4.02. The issuance of a second notice prior to expiration of the time the taxpayer has to petition the Tax Court gives the taxpayer the option to petition either notice. G.C.M. 33366, In re: Statutory Notice of Deficiency, I-2166 (November 3, 1966), at 6. Issuance of a second notice may also shift the burden of proof from the taxpayer to the Commissioner. However, it is important to note that a second notice of deficiency is not necessary as long as all of the unreported income is included in the original notice of deficiency determined by the IRS. It is our recommendation that a second notice of deficiency only be issued if there is additional unreported income on the return that was not included in the original statutory notice of deficiency.
- b. **Question:** Is the Service required to issue a revised report notifying the taxpayer of changes made to the return?
 - i. **Answer:** If a second notice of deficiency is being sent to the taxpayer, either prior to the 90 days running or thereafter, it would be good practice to include a revised report with this second notice. In order for a statutory notice of deficiency to be valid it must contain three elements: (1) it must advise a taxpayer that respondent has determined a deficiency for a particular year; (2) it must specify the amount of the deficiency; and (3) it must provide sufficient information to permit the computation of the deficiency. Portillo v. Commissioner, 932 F.2d 1128, 1132 (5th Cir.1991). Providing the taxpayer with a revised report provides them with the information used to compute the proposed deficiency.
- c. **Question:** Is the Service required to issue Appeal rights when a change is made to the taxpayer's return?
 - i. **Answer:** Appeal rights are traditionally given to a taxpayer when a 30 day-letter is sent. As indicated in your email, here we are examining what needs to be done in conjunction with statutory notices of deficiency. No appeal rights need to be issued when sending a new statutory notice of deficiency. Please note that if

any item is being disallowed on a return, a statutory notice of deficiency should be issued.

d. Question: If the return received is for a joint filing, what contact is required of the Service? Prior opinion provided that a Statutory notice would be needed for the secondary taxpayer's unreported income issue. Would it also be needed to notify the secondary of changes to the return that were a result of the primary's unreported income?

i. Answer: No. Per IRM 25.15.3.4.1.1 a taxpayer's filing status on a substitute for return will be either single or married filing separately. The Service cannot elect joint filing status for married taxpayers. The taxpayer may later file a joint return with his/her spouse. If the Service filed a substitute for return for a non-filer and an assessment was made following a statutory notice of deficiency, the resulting amount owed is a liability due to a deficiency assessment. A joint return filed after the assessment does not change the character of the assessment, even if the tax is later abated to reflect the tax on the joint return filed. The assessment therefore is against the primary spouse and a statutory notice of deficiency does not need to be issued to the secondary spouse unless it pertains to the jointly return filed. If a deficiency does relate to a joint return filed after the first notice of deficiency has been sent, a notice of deficiency can then be sent to the secondary spouse. Furthermore, in the absence of a notice of deficiency issued to the first spouse or the subsequently filed joint return that includes all unreported income indicated in the first statutory notice of deficiency issued to the primary spouse, the secondary spouse cannot be liable for any remaining unreported income of the primary spouse.

Proposal 2:



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a. Question: Does the Service have jurisdiction to make a change to these forms without prior knowledge and consent of the taxpayer?

ii. Answer: There is nothing in the Internal Revenue Code prohibiting these changes.

b. Question: What notification to the taxpayer is needed if the change is made?

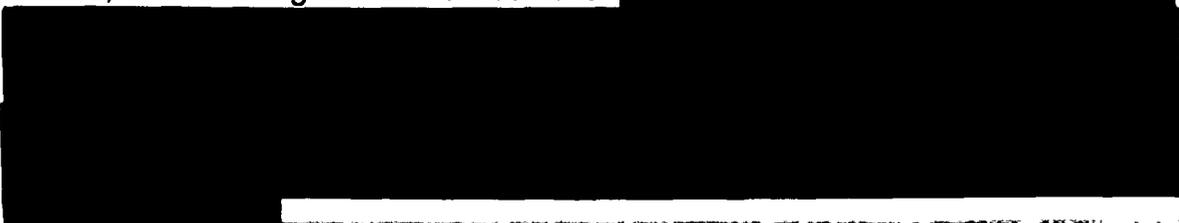
iii. Answer: When changes are made, the Service should send the taxpayer a revised Form 8812 as part of the taxpayer's return.

Proposal 3: 

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- a. Question: What correspondence is required for such a change?
- a. Answer: When the change is made, please send the taxpayer whose credit is disallowed a revised return.
- b. Question: If the Statutory Notice of Deficiency has not been issued, would the Service be required to issue one with a revised report?
- a. Answer: Yes, anytime an EIC is disallowed a statutory notice of deficiency must be issued. Please see I.R.C. § 6213 for statutory exceptions.
- c. Question: If the original ASFR Statutory Notice of Deficiency has been issued, would a second one be required once the return with a questionable dependent is received?
- a. Answer: If a second notice is issued and no petition has been filed within the 90 day time period to petition the Tax Court, the taxpayer can petition either notice, as the issuance of a second notice does not invalidate the first. Thus it is a policy question left to your office as to whether two statutory notices of deficiency should be outstanding simultaneously.
- d. Question: Are Appeal rights required once the change is made?
- a. Answer: Appeal rights are only sent with a 30-day letter. Thus, unless a 30-day letter is being issued, Appeal rights do not need to be sent when a change is made. However, please remember that if any item will be disallowed on a return, a statutory notice of deficiency should be issued.

Proposal 4: Currently the ASFR unit sends a proposed assessment with letter 2566SC/CG prior to issuing the Statutory Notice of Deficiency. At the time of the 2566, a dummy TC 150 is posted to the Master File in preparation of the Statutory Notice, and resulting default assessment. 



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- a. Question: Is there a legal requirement to post a TC 150, or dummy adjustment at the time the proposed assessment is sent to the taxpayer?
 - a. Answer: As discussed with the field on February 13, 2008, this is a policy question best left to their discretion.

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) 622-7950 if you have any further questions.