

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

CC:WI:JBMinsky
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to: Peggy Bogadi
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SE:W:CAS:SP

from: Carol A. Campbell
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subject: Correspondence to the Taxpayer for Missing Information and Supporting Schedules

This memorandum responds to your request for advice regarding the validity and processibility of returns, and whether the Service must correspond with the taxpayer for any missing information or supporting documentation.

ISSUES

1. Whether an unsigned return constitutes a valid return such that the Service may assess tax or issue a refund. In addition, whether such return is processible under section 6611(g).
2. Whether a return filed without a required entry, form, schedule, or other missing information or documentation is a valid return such that the Service may assess tax or issue a refund. In addition, whether such return is processible under section 6611(g).
3. Whether the Service may use the math error procedures of section 6213(b)(1) to assess additional tax due where there is a missing entry, form, schedule or other missing information or documentation that would be needed to substantiate an entry on the return.

CONCLUSIONS

1. A return filed without the requisite signature, or a return that does not contain sufficient data to calculate the tax liability, does not constitute a valid return for purposes of the statute of limitations or penalties period. The Service may not assess the tax shown on an invalid balance due return. The Service may, however, assess the amount of a partial payment or remittance accompanying an invalid balance due return. An unsigned refund return likewise does not

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constitute a valid return, but should nevertheless be retained by the Service as it could constitute an informal claim for refund. If the informal claim requirements are satisfied, the document should be processed as an informal claim for refund. In all unsigned return situations, the Service should retain the invalid return and correspond with the taxpayer to obtain the missing signature or information. An invalid return is not processible for purposes of section 6611(g).

2. A return filed without a required entry, form, schedule, or other missing information or documentation is a valid return for all purposes. Accordingly, the Service has an obligation to retain the valid return, and assess the tax shown as due on the return regardless of whether it is a balance due, refund or zero balance return. Further, the Service should correspond with the taxpayer for the missing information and/or documentation. Whether a return missing documentation is processible for purposes of IRC § 6611(g) will depend upon the specific facts of each individual case.
3. If the missing information or documentation meets the standards of section 6213(g)(2)(D), the Service may use the math error procedures to assess any additional tax due because an entry on the return is not properly substantiated.

Discussion

Chief Counsel has consistently advised that returns without a signature are invalid, and that signed returns missing supporting documentation are valid returns that may not be processible for purposes of overpayment interest. In addition, prior advice concluded that the Service should not vary its treatment of returns based on whether the returns are balance-due, refund, or zero/even-balance when correspondence is required.

The Service currently retains all balance due, remittance or partial-paid returns, whether missing a signature or other supporting documentation. To perfect a return missing a signature, the Service sends a letter, along with a jurat, requesting that the taxpayer sign and return the jurat. Once received, the jurat is then attached to the return. Similarly, to perfect a balance due, remittance or partial-paid return missing supporting documentation, the Service holds the return and sends a letter requesting the necessary supporting documentation. If the taxpayer fails to respond in either circumstance, the Service assesses the tax shown as due on the return and institutes procedures to collect the amount due.

Conversely, if the Service receives a refund or zero/even balance return missing a signature or other supporting documentation, the return is sent back to the taxpayer with a correspondence sheet asking for the missing signature or supporting documentation. If the taxpayer fails to respond, the Service takes no further action.

Although prior requests for advice have been limited to individual income tax returns, this request for advice encompasses all returns, including, but not limited to, individual,

corporate, S corporation, partnership, estate, trust, gift, and generation-skipping transfer tax. Accordingly, for purposes of this memorandum, the term "return" encompasses all paper return types.

ANALYSIS

Validity of the Return

Although Congress has granted the Commissioner broad authority to determine what information should be submitted with a tax return, and how that information should be submitted, the issue of what constitutes a valid return is frequently litigated. Courts have stated the four criteria for a valid return as follows:

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

Beard v. Commissioner, 82 T.C. 766, 777 (1984), *aff'd per curiam*, 793 F.2d 139 (6th Cir. 1986). If a return meets these criteria, generally known as the "substantial compliance" standard, the return is a valid return for purposes of the statute of limitations on assessment.

Because a signature is a necessary element of a valid return, any return received by the Service that is not signed by the taxpayer is an invalid return. See also IRC § 6061 and the accompanying regulations concerning the requirement that a return be signed. To determine whether a return which lacks a required entry, form, schedule, or other supporting documentation is nonetheless a valid return, courts typically apply the substantial compliance standard to the specific facts of each case. A return will be valid if it provides sufficient data to allow the Service to calculate a tax liability (the other three criteria will almost always be satisfied). The fact that the tax liability computed on the original return is later determined to be incorrect does not cause the return to fail the substantial compliance standard.

Under section 6201(a)(1), the Service is required to assess all taxes determined by the taxpayer or the Service and shown on a valid return. If a taxpayer files an invalid balance due return, the Service must determine a deficiency in order to assess the tax that is properly due. In the case of income, estate, gift, and excise taxes under chapters 41, 42, 43, or 44, the Service cannot assess tax before the later of 90 days (150 days if the notice is addressed to a person outside the United States) after sending a statutory notice of deficiency or, if the taxpayer timely petitions the Tax Court in response to the

notice of deficiency, the date the decision of the Tax Court becomes final¹. IRC § 6213(a). In the case of an invalid balance due employment tax return, the Service is not required to send a statutory notice of deficiency before making an assessment, but the Service gives the taxpayer a right to appeal the determination prior to assessing the tax.

Filing an invalid balance due return will not begin the limitations period on assessment. IRC § 6501(c)(3). If the Service assesses tax from an invalid balance due return without following the deficiency procedures (where required), the assessment is invalid, and the Service may not collect the tax. Any tax that is collected as a result of the invalid assessment is considered an overpayment under section 6401 and must be credited or refunded to the taxpayer under section 6402.

If the Service is in receipt of an invalid balance due return that includes a partial payment or remittance, the Service may assess the amount of tax paid with the return. Under section 6213(b)(4), the Service has discretion to assess the amount of tax paid with an invalid balance due return without following the deficiency procedures mentioned above.

An invalid refund return may be considered an informal claim for refund. An informal claim for refund is adequate if it: (1) is in writing, (2) includes a request for a refund/credit for certain years or periods, and (3) informs the Service of the basis for the overpayment and provides sufficient information as to the tax and year to allow the Service to examine the claim. If all of these factors are met, the Service should process the informal refund claim.

Processing a refund claim does not necessarily mean that a refund must be issued. Instead, the Service must determine whether the information provided by the taxpayer is sufficient to justify the claimed refund. If not, the Service can process a claim for refund by disallowing or partially disallowing the claim. Further, while the Service should process all claims for refund (whether formal or informal), the obligation is not absolute. That is, a taxpayer is able to file a refund suit in U.S. District Court either within two years of the Service specifically denying the claim for refund, or if no denial is issued, any time that is at least six months after the claim for refund was filed. See IRC § 6532. If the Service fails to process a refund claim, the two year period for filing suit will not begin to run.

Math Error

The summary assessment procedures set forth in section 6213(b)(1) allow the Service to make assessments without first issuing a statutory notice of deficiency when a return contains a mathematical or clerical error. Section 6213(g)(2)(D), defines a mathematical or clerical error as "an omission of information which is required to be supplied on the return to substantiate an entry on the return." The legislative history

¹ A Tax Court decision becomes final 90 days after the decision is entered unless the taxpayer appeals the determination, in which case, the Service may assess the tax unless the taxpayer posts a bond. I.R.C. §§7481(a)(2) and 7485(a).

provides that the intent of section 6213(g)(2)(D) is-

to deal with situations where items (on the return) should be supported by schedules which are part of the return. For example, if deductions are itemized (rather than the taxpayer taking the standard deduction), Schedule A should be included with the return . . . Where the necessary supporting schedule is omitted from the return, then the Service may proceed under this provision by disallowing the beneficial treatment-- unless the taxpayer supplies the necessary schedule. Here, too, the notification by the Service should be so designed as to encourage the taxpayer to supply the omitted schedule.

H.R. Rep. No. 658, 94th Cong., 1st Sess. 291-292, 1976-3 C.B. (Vol. 2) 983-984; see also S. Rep. No. 938, 94th Cong., 2d Sess. 377, 1976-3 C.B. (Vol. 3) 415.

In light of the legislative history, the following general guidelines or factors should be considered when deciding whether it is appropriate to use section 6213(g)(2)(D) to disallow items on a return:

- the line item on the Form 1040 for which the taxpayer omitted a schedule or form provides a tax benefit to the taxpayer;
- the schedule or form substantiates an item contained on the return, it does not calculate an entirely different tax;
- the omission is not on the Form 1040 itself, but rather the omission stems from the taxpayer's failure to attach a schedule or form to substantiate an entry on the Form 1040;
- the schedule or form must be required to be attached to the Form 1040;
- there is an omission of the entire schedule or form, not just information required to be included on the schedule or form; and
- the missing form or schedule must be submitted to the Service by the taxpayer, not by a third party.

Application of these guidelines can be demonstrated by analyzing a few different situations with missing forms or documents.

A taxpayer files Schedule A with his Form 1040 when that taxpayer is itemizing deductions. Line 40 of Form 1040 for the 2007 tax year provides for the entry of the amount for itemized deductions or for the standard deduction without delineating which of the two the taxpayer is electing. The Form 1040 instruction booklet advises on line 40 of the Form 1040 that "[t]o figure your itemized deductions, fill in Schedule A." There is no instruction requiring taxpayers to attach the Schedule A. The instructions for

Schedule A advise taxpayers to "[u]se Schedule A (Form 1040) to figure your itemized deductions" and likewise, fails to require taxpayers to attach the Schedule A. While the 1040 booklet instructions to Form 1040 and Schedule A do not specifically require the Schedule to be attached to the Form 1040, the explicit language on the Schedule A itself, requires that the taxpayer "Attach to Form 1040." This is sufficient to notify taxpayers that the Schedule A is required to be supplied with the return.

Form 1040 has changed substantially since 1976, the year section 6213(g)(2)(D) was initially enacted. Unlike returns for the 1976 tax year which contained boxes allowing the taxpayer to indicate either that he was itemizing and attaching a Schedule A or taking the standard deduction, line 40 of Form 1040 for the 2007 tax year requires the entry of the dollar amount for the deduction, without indication of whether it is an itemized or standard amount.

The basic standard deduction is comprised of a standard amount based on the taxpayer's filing status. There is an additional standard deduction amount of \$1,050 for each married taxpayer that is at least 65 years of age or blind. If both blind and 65 years of age or older, the taxpayer is allowed an additional standard deduction amount of \$2,100. If a taxpayer is single or files as head of household the additional standard deduction amount is \$1,300 for age or blindness, and \$2,600 for both.

Line 39a on the 2007 tax year Form 1040 provides boxes to check concerning whether you were born before January 2, 1943, whether your spouse was born before January 2, 1943, whether you are blind and whether your spouse is blind along with a box to list the total boxes checked. The instructions for line 39a direct taxpayers to check the appropriate boxes and enter the total number of boxes checked. The failure to properly check these boxes or list the proper number of boxes checked would not provide the Service with authority to use section 6213(g)(2)(D) since this would be an omission on the Form 1040 itself rather than the omission of a schedule or form.

Before applying section 6213(g)(2)(D) to disallow the deduction on line 40 when there is no Schedule A attached to the return, the Service must be certain that the taxpayer did not intend to claim the standard deduction (for example, including an increased standard deduction to account for age and/or blindness while failing to mark the appropriate box(es) on line 39a). We think it reasonable to conclude that a taxpayer is not claiming the standard deduction when the amount on line 40 exceeds the highest amount allowable for the standard deduction in a given year.

We note that it may appear at first blush that the failure to check a box and enter the total number of boxes checked on line 39a may alone form the basis for the Service to use the math error procedures in section 6213(g)(2)(C). That section defines "math or clerical error," to include an "entry on a return of an item which is inconsistent with another entry of the same or another item on such return." The legislative history states that summary assessment procedures cannot be used when the Service is merely resolving an uncertainty against the taxpayer. The summary assessment procedures also cannot be used when it is not clear which of the inconsistent entries is the correct

one. In this situation, it is possible that a taxpayer may fail to check the box or boxes and list the number of boxes checked but still report, and qualify for, an increased standard deduction. Therefore, it may not be apparent from the face of the return whether an entry on line 40 is inconsistent with another entry. If a taxpayer fails to fill in any box on line 39a then that would not be an entry at all and the omission simply would not be inconsistent with another entry on the return. In any event, it would be inappropriate to use section 6213(g)(2)(C) without more information on the return which would reveal an inconsistency.

Schedule SE, Self Employment Tax, can also illustrate the proper use of the guidelines set forth above. Schedule SE provides the method under which a taxpayer computes the amount of self employment tax owed by the taxpayer. The taxpayer then takes the calculation from that schedule and inserts that amount on his Form 1040. Schedule SE is required to be filed with a taxpayer's Form 1040.

Self-employment tax is a different tax than the income tax computed on the return itself. Schedule SE does not merely substantiate an item on the Form 1040, but rather that schedule calculates an entirely new tax – the amount of self-employment tax that the taxpayer owes. As such, use of section 6213(g)(2)(D) is inappropriate in a situation where the taxpayer fails to attach the Schedule SE to his return.

The types of schedules described by the legislative history, e.g., Schedule A (itemized deduction), Schedule G (income averaging), Form 4736 (maximum tax), are all forms or schedules that support the taxpayer's assertion on his return that he owes less tax than he would otherwise. This language indicates that section 6213(g)(2)(D) was intended to be utilized in situations where the taxpayer benefits by the inclusion of the amount on the line item which requires the schedule or form. Schedules or forms that compute a tax required to be reported on a Form 1040 are not considered forms that substantiate amounts already on the return, nor are they beneficial to the taxpayer.

Following the above reasoning, forms such as Form 6251, Alternative Minimum Tax – Individuals, and Form 5329, Additional Taxes on Qualified Plans (Including IRAs) and Other Tax-Favored Accounts, should not be subject to the math error procedures set forth in section 6213(g)(2)(D) if they are not filed with a taxpayer's return. These forms calculate taxes that are separate from the income tax calculated on an individual's Form 1040 and are not beneficial to the taxpayer.

Forms prepared by third parties, such as Form W-2 or Form 1099, that have been sent to the taxpayer and submitted to the Service by the payor under mandate by the Internal Revenue Code, are not considered part of a taxpayer's "return." Accordingly, if such a form is not included by the taxpayer with his return, the Service cannot utilize the math error procedures set forth in section 6213(g)(2)(D) in order to require the taxpayer to provide that information. However, a distinction can be drawn with regard to withholding tax that is reported on a Form W-2. While IRC § 6213(g)(2)(D) would not permit the use of math error procedures for a taxpayer's failure to attach a Form W-2 to a return, IRC § 6201(a)(3) provides statutory authority to disallow any overstatement of the amount of

withholding tax claimed on a return. Thus, if the taxpayer does not attach a Form W-2 and does not, in response to a request by the Service, provide any substantiation for the withholding tax claimed on the return, the Service is authorized to disallow the claimed withholding pursuant to IRC § 6201(a)(3).

In summary, the question of when the Service is able to use the math error procedures is very fact specific. We have merely set forth guidelines with respect to section 6213(g)(2)(D). Our analysis is not intended to be exhaustive.

Processibility

Processibility is significant primarily in relation to overpayment interest. Interest is not paid on a refunded overpayment if the refund is made within 45 days after the due date of the return or the date it was filed, whichever is later. A return is not considered filed until it is in "processable form." Section 6611(e)(1), (g)(1). A return is in processible form if it: (1) is filed on a permitted form; and (2) contains the taxpayer's name, address, identifying number, the required signature, and sufficient required information (whether on the return or on required attachments) to permit the mathematical verification of tax liability shown on the return. Section 6611(g)(2).

As discussed previously, if a return satisfies the substantial compliance standard, the return is a valid return for purposes of the statute of limitations and penalties. Accordingly, the Service should accept as filed a return that purports to be a return and constitutes an honest and reasonable attempt to satisfy the requirements of the law. Section 6611 requires a higher level of substantiation to determine whether the taxpayer has overpaid his or her taxes and whether the Service owes the taxpayer interest. Thus, whether a signed return submitted without a required entry, form, schedule, or supporting documentation is processible will depend on whether the Service can accurately determine the amount of the overpayment from the information provided with the return. If the Service cannot determine the amount of the overpayment, the Service should correspond with the taxpayer for the missing information.

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