

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

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to: Janice M. Townson
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Exam Policy Support

from: Blaise G. Dusenberry
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(Procedure & Administration)

subject: Forms 1040 Containing All Zeros filed after SFR Assessment

This program manager technical assistance memorandum responds to your request of July 1, 2013.

ISSUE

Whether an untimely submitted Form 1040 containing all zeros in the spaces for the taxpayer's income and loss figures is a valid tax return which the Service must accept in the audit reconsideration program.

CONCLUSION

No.

FACTS

You seek assistance on the correct course of action to take when taxpayers submit late-filed Forms 1040 containing all zeros. A common situation involving this issue is as follows. The Service makes a determination that a couple, residing in a state that follows community property rules, received taxable income for a particular year and should have filed a return. The Service prepares a substitute for return under Code section 6020(b) and issues a notice of deficiency. Neither spouse contests the notice of deficiency by filing a petition for redetermination in the Tax Court. As a result, the Service assesses the tax, additions or penalties.

One of the spouses against whom the tax was assessed later submits a Form 1040 using the filing status married filing separate. The Form 1040, though, contains all zeros in the spaces for income and loss figures. You observed that under the Service's procedures governing the audit reconsideration program, if the submitted Form 1040 containing all zeros is a valid tax return that must be accepted, the assessed tax and additions must be abated.

You provided copies of Forms 1040 for a specific case in which a taxpayer (W) resides in State A, a community property state. The Service determined that W and her husband (H) received substantial income in taxable years 2005 and 2006 but did not file tax returns. The Service prepared SFRs for both taxable years and issued a separate notice of deficiency to H and to W on December 5, 2008. Neither H nor W petitioned the Tax Court for a redetermination. The Service thereafter assessed H and W for the amounts determined in the notice of deficiency.

On December 27, 2010, the Austin Service Center received Forms 1040 for taxable years 2005 and 2006 signed by W under the filing status married filing separate. The Forms 1040, however, contain all zeros in the spaces, beginning on line 7, for listing income or loss amounts. W claimed the standard deduction and one personal exemption for both taxable years; W listed \$0 as the tax and \$0 payments on both Forms 1040. Neither Form 1040 had attached to it a W-2 or other information return, nor did W not claim a refund for either taxable year.

You would like our views on whether Exam should accept submissions of purported returns such as those W submitted.

DISCUSSION

The income tax consequences flowing from state community property laws are not expressly treated in the Code; rather, the Supreme Court and various circuit courts determined how married taxpayers living in community property states are taxed. See e.g., Poe v. Seaborn, 282 U.S. 101 (1930) (Washington); Hopkins v. Bacon, 282 U.S. 122 (1930) (Texas). Based on the determination that married taxpayers residing in a community property state have an undivided one-half interest in the entire community, the law is settled that such taxpayers must file either joint tax returns or married filing separate returns reflecting one-half of the total community income and expenses. United States v. Mitchell, 403 U.S. 190 (1971); United States v. Malcom, 282 U.S. 792 (1931).

Your inquiry also implicates the legal effect of a tax form submitted to the Service containing only zeros. A document is considered a "return" under the Code if it: 1) includes sufficient data on which to calculate the taxpayer's income, 2) purports to be a tax return, 3) represents an honest and reasonable attempt to satisfy the requirements of the Code; and 4) is executed under penalty of perjury. Beard v. Commissioner, 82 T.C. 766, 777 (1984), *aff'd.*, 793 F.2d 139 (6th Cir. 1986).

Last year Judge Vasquez summarized the law in this area in Caton v. Commissioner, T.C. Memo. 2012-92, noting that the Tax Court and a majority of the circuit courts have held that a return containing only zeros is generally not a valid return. See also United States v. Edelson, 604 F.2d 232 (3d Cir. 1979); Cabirac v. Commissioner, 120 T.C. 163 (2003). The Ninth Circuit Court of Appeals, though, has ruled that a tax return with all zeros is a “return” for purposes of Code section 7203, which classifies willful failure to make a return as a criminal misdemeanor. United States v. Long, 618 F.2d 74 (9th Cir. 1980). Long, as the Ninth Circuit Court observed in a later case, involved a criminal penalty and turned on the presence or absence of financial information on the tax return, in determining its validity. United States v. Kimball, 925 F.2d 356, 358 (9th Cir. 1991). Moreover, the Tax Court upheld the failure to file addition under section 6651(a)(1)—i.e. a civil penalty- in an all zero return case appealable to the Ninth Circuit Court of Appeals. Coulton v. Commissioner, T.C. Memo. 2005-199. The Tax Court in Coulton accepted the Service’s argument that the reasoning of Long did not apply in the context of the civil additions to tax under section 6651.

[REDACTED]

[REDACTED] Because Forms 1040 such as those submitted by W, described above, do not represent an honest and reasonable attempt to satisfy the tax laws, they are invalid. Zellerbach Paper Co. v. Commissioner, 293 U.S. 172, 180 (1934); Beard; supra. As a result, the Service need not accept them. Based on Coulton, the Service should also adhere to this approach for taxpayers who have addresses in the Ninth Circuit.

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Please call Gerald Semasek at (202) 622-4910 if you have any further questions.