

Office of Chief Counsel
Internal Revenue Service
memorandum

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to: Kenneth C. Corbin
Commissioner, Wage and Investment Division

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subject: Section 6213 Math Error Assessment Authority

This memorandum addresses the Service's ability to use math error assessment authority to correct the erroneous issuance of refundable credits identified in a July 17, 2017 TIGTA report, number 2017-40-042. For the reasons stated below, we conclude that section 6213 authorizes the Service to use math error authority to correct the errors identified in the TIGTA Report, even though the returns have already been processed and refunds have been issued. Accordingly, the Service has discretion to use either math error authority or deficiency procedures to assess the tax due.

Background

Section 6213(b)(1) allows the Service to make assessments without following the section 6213(a) notice of deficiency procedures if there is a mathematical or clerical error, as defined in section 6213(g)(2), appearing on the return. In lieu of a notice of deficiency giving the taxpayer 90 days to file a petition in the Tax Court, section 6213(b)(1) requires that the Service provide a notice to the taxpayer that an assessment has been or will be made based on the mathematical or clerical error. The taxpayer then has 60 days to request an abatement of the assessment. If the taxpayer requests abatement, the Service must abate the assessment. Before the Service can reassess the tax, it must follow the section 6213(a) notice of deficiency procedures.

Math error assessments were first authorized by section 274(f) of the Revenue Bill of 1926. The legislative history provided that "in the case of a mere mathematical error appearing upon the face of the return, assessment of a tax due to such mathematical error may be made at any time, and that such assessment shall not be regarded as a

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deficiency notification.” H.R. Rep. No. 69-1, at 11 (1926). The Tax Reform Act of 1976 added new section 6213(f)(2)¹ which defined “mathematical or clerical error” as:

(A) an error in addition, subtraction, multiplication, or division shown on the return; (B) an incorrect use of an Internal Revenue Service table if the error is apparent from the existence of other information on the return; (C) inconsistent entries on the return; (D) an omission of information required to be supplied on the return in order to substantiate an item on that return; and (E) an entry of a deduction or credit item in an amount which exceeds a statutory limit which is either (a) a specified monetary amount or (b) a percentage, ratio, or fraction - if the items entering into the application of that limit appear on that return.

The definition of mathematical or clerical error as set out in 1976 only contained these five specific items, all of which could be ascertained directly from the face of a return. These items remain subparagraphs (A) – (E) in current section 6213(g)(2).

After 1976, Congress expanded the definition of “mathematical or clerical error” in section 6213(g)(2) many times. In 1996, Congress added current subparagraphs (F), (G), and (H). All three of these subparagraphs apply to the omission of a correct taxpayer identification number (TIN)² required to claim certain credits, expenses or deductions. Most relevant here, subparagraph (F) applies to the omission of a correct TIN as required for entitlement to the Earned Income Tax Credit (EITC) under section 32.

In 1997, Congress enacted section 6213(g)(2) subparagraphs (I) and (J). Subparagraph (I) applies to the omission of a correct TIN required under section 24(e) relating to the Child Tax Credit and Additional Child Tax Credit (CTC/ACTC). Subparagraph (J) applies to an omission of a correct TIN required under section 25A(g)(1) relating to the American Opportunity Tax Credit (AOTC).

In 1998, Congress added language to section 6213(g)(2) that applies to all section 6213(g)(2) subparagraphs: “A taxpayer shall be treated as having omitted a correct TIN for purposes of the preceding sentence if information provided by the taxpayer on the return with respect to the individual whose TIN was provided differs from the information the Secretary obtains from the person issuing the TIN.” The legislative history indicates that Congress added this language to clarify that a correct TIN is one that was assigned by the Social Security Administration (SSA) or the Service to the individual identified on the return, and that there are no inconsistencies between the data that is reported on the return and the data from the agency issuing the TIN. H.R. Conf. Rep. No. 825, 105th Cong. 2d Sess. 1588 (1998); see also IRS CCA 200027006, 2000 WL 33116159 (math error can be used to disallow credits on basis that TIN listed was issued to a person that data showed died prior to year credit was claimed).

¹ In 1980, Pub. L. 96-589 redesignated former subsection (f) as current subsection (g).

² A taxpayer identification number (TIN) is an identifying number used for tax purposes. A TIN may be assigned by the Social Security Administration or by the IRS.

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Before the enactment of the Protecting Americans From Tax Hikes Act of 2015, P.L. 114-113 (PATH Act), taxpayers could claim the EITC, the CTC/ACTC, and the AOTC for the year in question on an amended or late-filed return with a TIN that was issued after the return's original due date. Effective December 18, 2015, however, PATH Act sections 204, 205, and 206 amended sections 32(m), 24(e), and 25A(i)(6) to provide that a taxpayer can use a TIN to claim one of these credits only if it was issued on or before the original due date of the return involved. These provisions were part of a package of provisions intended to reduce fraud, abuse, and improper payments in refundable credit programs (TIGTA Report, p. 2). PATH Act sections 204, 205, and 206 apply to any returns filed after the date of the enactment.

TIGTA reviewed tax year 2014 returns filed and processed during the 2016 filing season and identified more than \$34.8 million in EITC, CTC/ACTC, and AOTC credits that were paid to 15,744 taxpayers filing tax returns for years before their TINs were issued. Accordingly, the TIGTA Report notes that each of the refundable credit claims associated with the 15,744 returns should have been disallowed by the IRS based on the relevant PATH Act provisions.

In response to the TIGTA Report's recommendation to take steps to recover the erroneous refunds, the Service is considering the use of math error authority to disallow these credits. The specific provisions that authorize these math error assessments are subsections (F), (I) and (J) of section 6213(g)(2), which apply when there is an omission of a correct TIN required to be included on a return involving EITC, CTC/ACTC, and AOTC credits. When a taxpayer includes a TIN on the return claiming the credit, the taxpayer is representing that the TIN was timely issued. If, however, the TIN included on the late or amended return was untimely issued—contrary to the requirements of the PATH Act amendments—then there is an omission of a correct TIN on the return. The IRS determines that a TIN was untimely issued by obtaining data from the SSA or the Service's own records that shows the TIN was issued after the return's due date. In these cases, there is a difference between the information provided by the taxpayer on the return and the information obtained by the Secretary from the person issuing the TIN.

Analysis

The question posed is whether the Service may use math error authority after a return has already been initially processed. We conclude that there is no timing limitation on the Service's use of math error authority under section 6213(b), other than the three-year period of limitations on assessment. While Congress has repeatedly added to the list of items that constitute a math error since the enactment of the provision in 1926, Congress has never specified any timing limitations on when the Service may exercise its math error authority. There is nothing in the legislative history of section 6213 to suggest that math error authority may only be used during the initial processing of a return. See H.R. Rep. No. 1, 69th Cong., 1st Sess. 11 (1926) (noting that the new math error provision in the predecessor to section 6213(b)(1) "provides that in the case of a

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mere mathematical error appearing upon the face of the return, assessment of a tax due to such mathematical error may be made at any time...”).

The Service can assess a tax at any time prior to the expiration of the period of limitations for assessment. As a general rule, that limitations period is three years after the filing of the return under section 6501. Nothing in section 6213(b) indicates that a different rule should apply in the math error context, and in the absence of such language, the general rule that the Service has three years after the filing of a return to make an assessment controls. Accordingly, we conclude that the Service can exercise math error authority under section 6213(b) at any time within the statutory period of limitations for assessment, including in the circumstances presented here, after the initial processing of returns.

In our view, this conclusion is consistent with Congressional intent. It is certainly true that section 6213(b) initially authorized the Service to correct garden-variety mathematical and clerical errors that appeared on the face of returns. Today, however, section 6213(g)(2) now authorizes the correction of errors and the making of assessments relating to matters that are neither strictly mathematical or clerical errors, nor errors that can necessarily be identified just by looking at the return. In particular, the omission of a correct identification number on a return, as required by sections 32(m), 24(e) and 25A(g)(1), is not a mathematical or clerical error as originally contemplated by the statute, and whether a reported identification number is the correct number and was timely issued may not be obvious from the return itself.³ Nevertheless, the Service is able to catch these errors, using internal and third-party information, and Congress has chosen to add these additional provisions to the definition of “mathematical or clerical error.”

It is true that the Service will, in most instances, use its traditional and expanded math error authority during the initial processing of returns when the Service will generally discover these errors. In this case, however, due to the unique circumstances created by the effective date of the PATH Act revisions and the onset of the filing season, the Service did not have the procedures in place to catch the errors when processing these returns. These unfortunate circumstances at the initial processing stage do not deprive the Service of the authority to rely on section 6213(b) math error authority.

Our conclusion is also consistent with Counsel's prior advice. Counsel has interpreted math error authority narrowly, as a limited exception to the deficiency procedures. See e.g., GCM 37219 (1977 WL 46602). In each case we could find, Counsel determined that the facts of the case were not covered by the text of the most relevant math error exception.⁴ But in this case, the facts fall squarely within the math error exceptions of

³ Section 6213(g)(2)(O), which was enacted by the PATH Act and provides that a mathematical or clerical error includes the inclusion on a return of a TIN which has expired, been revoked, or is otherwise invalid, is another example of an error that may not be obvious from the return itself.

⁴ In Rev. Rul. 2005-51, the Service addressed whether math error authority applies where a taxpayer files a return that reports income in an amount different from that reported on a W-2. In considering whether there was “an entry on a return of an item which is inconsistent with another entry of the same or another item on such return” under subsection 6213(g)(2)(C), the Service concluded that it could not use math

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subsections 6213(g)(2)(F), (I) and (J), and the generally-applicable language of section 6213(g). Moreover, as previously discussed, section 6213(b) does not encompass any timing limitations. We are not aware of any Counsel advice that provides a basis for suggesting that the proposed use of math error authority here would be inconsistent with the statutory authority.

In our view, the litigation hazards associated with the Service's use of math error authority in these cases are minimal. One could view the Service's use of math error procedures here as the revival of a long-dormant authority that requires new Congressional authorization, analogizing this action to the decision of the Court of Appeals for the District of Columbia in Loving v. Internal Revenue Service, 742 F.3d 1013 (D.C. Cir. 2014). See also Steele v. United States, 2017 WL 2392425 (D.D.C. 2017). In Loving, however, the court held there was no statutory basis to support the Service's regulation of preparers and that the Service never had the authority to regulate return preparers. Here, by contrast, there is a clear statutory basis for the use of math error authority under section 6213. Furthermore, applying math error authority in these cases is consistent with the general Congressional intent to both eliminate fraud and abuse in claiming refundable credits and to provide the Service with streamlined authority to make corrections when credits are improperly claimed.

We considered possible due process and fairness concerns arising out of the arguably retroactive application of the math error corrections to these particular taxpayers. As discussed, however, notices of the math error assessment would be issued and taxpayers would have the opportunity to request abatement of the assessment and to seek pre-payment judicial review in Tax Court. Accordingly, we see no due process concerns with the use of math error authority under these circumstances. See, e.g., Phillips v. Commissioner, 283 U.S. 589, 595-600 (1931) (prepayment right to petition Board of Tax Appeals satisfies the requirements of due process); Schiff v. United States, 919 F.2d 830, 832 (2d Cir. 1990) (argument that assessment of tax violates due process is frivolous argument where taxpayer has opportunity for Tax Court review).

Finally, we considered the concern that some of the affected taxpayers whose credits were disallowed may have had their identification numbers cancelled without notification, and others may not have received their identification numbers in time due to

error because it was not apparent which entry was correct (the return or the W-2). The Service relied on legislative history which stated that this math error category applies "where it is apparent which of the inconsistent entries is correct and which is incorrect." See S. Rep. No. 938, 94th Cong. 2nd Sess., 376 (1976). Similarly, in GCM 37219, the Service addressed whether it could use math error authority to assess self-employment tax under subsection 6231(f)(2)(D) (currently, 6213(g)(2)(D)), which provides that a math error includes "an omission of information which is required to be supplied on the return to substantiate an entry on the return." The taxpayer reported self-employment income on his Schedule C and/or F but not on his Form 1040 (line 58) and without a Schedule SE (Computation of Social Security Self-Employment Tax). The Service concluded that the taxpayer did not make "an omission of information" because the Schedule SE does not "substantiate an entry on the return" due to the fact that the function of Schedule SE is to compute an entirely new tax and not merely to substantiate the amounts computed on Schedules C and F. The Service based this conclusion on legislative history indicating this math error category was to apply specifically to items that are to be supported by schedules (for example, Form 1040 and Schedule A), but not where an omitted schedule computes a new tax.

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processing delays. We have been informed by Wage and Investment, however, that the Service treats the application date of a TIN as the issue date, and the Service went to great lengths to advise the public of the deactivation of TINs under the PATH Act.⁵ Further, in the case of a deactivated ITIN, once a taxpayer renews his or her ITIN, the issuance date for that ITIN reverts back to the original issuance date. Notice 2016-48, 2016-33 I.R.B. 235. As a result, the only taxpayers impacted by the exercise of math error authority here would be taxpayers who *first* obtained an ITIN and filed a delinquent return after December 18, 2015, not taxpayers whose ITINs were previously obtained but deactivated based upon three years of nonuse or having middle digits of 78 or 79.

Nevertheless, there are cognizable fairness concerns about using math error authority after refunds have already been issued to taxpayers, many of whom are low income taxpayers. The use of math error authority, even when authorized, is not mandatory. The Service can always opt to follow audit procedures and issue notices of deficiency in lieu of the math error procedures. See IRS CC-TAM-PMTA-00125, 1996 WL 34422024 (legislative history makes clear math error procedures are permissive not mandatory). Accordingly, although there is no legal limitation on the Service's use of math error assessment authority in these cases, the Service could choose as a matter of policy to weigh the administrative convenience of using math error assessment procedures against fairness concerns when deciding how to correct the errors identified in the TIGTA Report.

Conclusion

For the reasons stated above, we conclude that section 6213 authorizes the Service to use math error authority to make the assessments under the circumstances identified in the TIGTA Report. The decision of whether to pursue assessments through math error authority or notice of deficiency procedures is, however, a policy decision to be made by the Service.

cc:

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⁵ See, e.g., Notice 2016-48, 2016-33 I.R.B. 235; IR-2016-100 (Aug. 4, 2016), IRS Works to Help Taxpayers Affected by ITIN Changes; Renewals Begin in October <https://www.irs.gov/newsroom/irs-works-to-help-taxpayers-affected-by-itin-changes-renewals-begin-in-october>; IR-2016-173 (Dec. 21, 2016) Many ITINs Expire Jan. 1; Renew Now to Avoid Refund Delays, IRS Says; Publication 5256, *You May Need to Renew Your Expired ITIN* (English and Spanish); Publication 5257, *Renewing Your ITIN* (English and Spanish); and Publication 5259, *ITIN Fact Sheet* (English and Spanish).