ACKNOWLEDGED SIGNIFICANT ADVICE, MAY BE DISSEMINATED

Office of Chief Counsel **SCA 1998-035**
Internal Revenue Service **Released 12/04/98**

memorandum

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date: JAN 29 1998

to: Associate District Counsel, Salt Lake City
Attn: Mark H. Howard

from: Assistant Chief Counsel (Income Tax & Accounting)

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subject: Request for Significant Service Center Advice
Questions on changing of filing status

This responds to your request for Significant Advice, dated September 19, 1997, in connection with questions posed by the Ogden Service Center.

Disclosure Statement

Unless specifically marked "Acknowledged Significant Advice, May Be Disseminated" above, this memorandum is not to be circulated or disseminated except as provided in CCDM (35)2(13)3:4(d) and (35)2(13)4:(1)(e). This document may contain confidential information subject to the attorney-client and deliberative process privileges. Therefore, this document shall not be disclosed beyond the office or individual(s) who originated the question discussed herein and are working the matter with the requisite "need to know." In no event shall it be disclosed to taxpayers or their representatives.

Issues

1) How should the Service process returns claiming the status of married filing jointly received after the time to elect that filing status has passed?

2) How should the Service proceed if a nonfiler shows agreement with examination results by paying the liability shown in the examination report, but the nonfiler does not sign the report or file a return? What is the effect if the individual later files a joint return?

3) Should the Service agree to a change in filing status from married filing jointly to married filing separately if the taxpayer does not provide any reason for the change or if one of the taxpayers has been participating in illegal activity?

Conclusions

1) The Service should follow the deficiency procedures to assess the correct tax.

2) The Service should make an assessment based upon the taxpayer's payment. A subsequent return may result in an additional assessment or may constitute a claim for refund.

3) Although there are some exceptions, the Service generally should not agree to a change in filing status under these circumstances.

Issue 1

Facts

Sometimes after the Service commences the examination of a taxpayer who has not filed a return, the taxpayer decides to file a married filing jointly return. The Service Center asks how to process a return if the taxpayer's spouse filed an earlier return claiming the status of married filing separately and three years from the return due date has passed, thus limiting the right to elect to file jointly. § 6013(b)(2)(A). Two branches within the Service Center follow different procedures in processing such returns.

Under Branch 1's procedures, a report determining the taxpayer's federal income tax liability is prepared using the married filing separate status. If the report does not result in an increase in tax, Branch 1 assesses the tax and notifies the taxpayer that the election to file a joint return was not timely. If the report results in increased liability, Branch 1 sends the report to the taxpayer and asks the taxpayer to sign the report and agree to the change in tax liability. If the taxpayer does not sign the agreement, Branch 1 prepares a notice of deficiency. In most cases the taxpayer either agrees or defaults on the notice of deficiency, and Branch 1 assesses the tax.

In contrast, Branch 2 treats the change in filing status as mathematical or clerical error, as defined in § 6213(g)(2). The liability is computed on a married filing separate basis and the tax assessed. Branch 2 then prepares a letter notifying the taxpayer that the time to elect to file a joint return had expired. Branch 2 does not issue a notice of deficiency.

Discussion

Branch 2 apparently concluded that the error is based on an incorrect use of the married filing joint tables. However, § 6213(g)(2)(B) limits correction of an incorrect use of a table

to instances where the incorrect use is apparent from the existence of other information on the return.[1] Under the facts provided, the consideration of another return (the earlier return filed by the spouse) is necessary to reveal the existence of the error. Because the error is not apparent from the face of the taxpayer's return, the Service may not use the math error procedures to correct this problem.

Branch 1's procedure, recomputing the tax and making an assessment if the recomputed tax is less than the amount shown on the return, may not be followed because the effect of the joint return is unclear. The only certainty is that the return is erroneous because it was filed after the due date and one spouse previously filed a separate return. § 6013(b). Consider, for example, if the wife had filed married filing separate and reported $100x of tax liability and then the husband and wife file a late, and thus erroneous, joint return reporting $125x of tax liability for the same year. Under Branch 1's approach, as we understand it, the Service would assess $125 of tax liability for the husband. The husband could, however, have $25x of tax liability with the wife having a liability of $100x. The § 6201(a)(1) authority to assess taxes shown on returns depends on the concept of agreement by the taxpayer to the amount shown on the return. See Penn Mutual Indemnity Co. v. Comm'r, 32 T.C. 646, 668 (1959) (concurring opinion), aff'd, 60-1 USTC ¶ 9389 (3d Cir. 1960). Because the taxpayer has not shown agreement to the liability, the Service Center should not summarily assess the amount shown. In the absence of agreement by the taxpayer to the examination results, the Service should issue the taxpayer a notice of deficiency computing the tax liability using the appropriate married filing separate status.

Issue 2

Facts

The Examination Branch conducts many substitute for return (SFR) examinations; these examinations involve taxpayers who have not filed returns for the years under examination. Sometimes after the Examination Branch has begun an SFR examination and sent the taxpayer a report, the taxpayer shows agreement with the report by sending in payment of the liability shown in the report. Under current procedures, the Examination

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[1] An example of an incorrect use of a table is the use of the single taxpayers' tax rate schedule by an individual who has indicated the filing status of married filing separately. General Explanation of the Tax Reform Act of 1976, 94th Cong., 2d Sess. 373 (1976), 1976-3 (Vol. 2) C.B. 1, 385.

Branch would close the case "agreed per full payment of tax" even though they had not received a return or a report signed by the taxpayer agreeing to the liability. After this occurs, the taxpayer will sometimes file a joint return.

Discussion

Based on these facts, the Examination Branch poses the following questions:

1. If neither spouse has previously filed, should the Examination Branch give any consideration to the return claiming joint filing status?

2. Should the Examination Branch solicit an agreement in addition to the full payment of the liability shown in the examination report?

We first note that we agree with the assessment based on the taxpayer's payment. If any payment is made before the mailing of a notice of deficiency, § 6213(a) does not prohibit the assessment of such amount, and such amount may be assessed if such action is deemed to be proper. §§ 6213(b)(4), 301.6213-1(b)(3). Rev. Proc. 84-58, 1984-2 C.B. 501, provides that the Service will treat a remittance as a payment of tax if it is made in response to a proposed liability as proposed in a revenue agent's or examiner's report, and remittance in full of the proposed liability is made.

Even though assessment based on the payment is valid, the subsequent return may have legal consequences. In particular, if the report is prepared as a substitute for return (SFR), agreeing to it could prevent the taxpayer from filing a claim for refund using the tax rates for married filing jointly. In the situation you raised, the taxpayer has not executed an agreement to the report. If, however, the report is prepared as an SFR for each spouse and a spouse executes an agreement to that report, the agreed report should constitute a return under § 6020(a) for that spouse.[2] If a spouse made a § 6020(a) return applying the rates

[2] The basic requirements for a § 6020(a) return are as follows: (1) the return must include information identifying the taxpayer and the data to calculate tax liability must be reflected in the document; (2) the Service must intend the document to function as the taxpayer's return; and (3) the return must be subscribed to by the Secretary or his delegate. See Hartman v. Comm'r, 65 T.C. 542, 546 (1975). As indicated above, to constitute a § 6020(a) return, the taxpayer must also execute an agreement to the SFR.

for a separate return for a tax year in which a joint return could have been made, a subsequent claim refund using the rates for a joint return will constitute the spouse's return only if the conditions listed in § 6013(b)(2) are met.[3] Accordingly, while the agreement of a spouse to a report may not provide any significant legal benefit to the Service, that agreement could be detrimental to the spouses if the report is prepared as an SFR.

If a taxpayer does not execute an agreement to the SFR, it constitutes a § 6020(b) return. A § 6020(b) return does not constitute a return for purposes of § 6013(b). Millsap v. Comm'r, 91 T.C. 926 (1988), acq., 1991-2 C.B. 1.[4]

In response to question 1, if the return shows a decrease in the tax liability and if the taxpayer filed it within the appropriate time period, the return should qualify as a claim for refund. § 6511(a). If the return showed an increase in tax, the tax may be assessed because the taxpayer had not filed an earlier return to start the statute of limitations. § 6501(c)(3). Thus, each return will require a case by case analysis to determine what impact it has.

In response to question 2, the agreement of the taxpayer to the examination results does not necessarily provide a significant benefit to the Service, although it does provide an additional basis for an assessment. § 6213(d). Except as discussed above, the signed agreement does not prevent the taxpayer from later contesting the liability or filing a return showing a different liability nor does it prevent the Service from asserting further liability. See Wolf v. Comm'r, T.C. Memo. 1991-212, 61 T.C.M. (CCH) 2608, 2618-19 (1991), aff'd, 4 F.3d 709, 714 (9th Cir. 1993).

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[3] Section 6013(b)(2) sets forth four limitations. One limitation that can be relevant in the case of a spouse who did not file a return until contacted by the Service prohibits making the election to file jointly after the expiration of three years from the last date prescribed by law for filing the return (determined without regard to any extension of time granted to either spouse).

[4] While § 6020(b)(2) describes such a return as "prima facie good and sufficient for all legal purposes," it does not start the statute of limitations on assessment and collection, § 6501(b)(3), and the amount shown as due must be assessed under the deficiency procedures, see Taylor v. Comm'r, 36 B.T.A. 427 (1937). For returns due on or after July 30, 1996, the § 6020(b) return does not stop the failure to file penalty. § 6651(g).

Issue 3

Facts

The Service Center also wants to know more about when a taxpayer can change his or her filing status from married filing jointly to married filing separate. They ask if the Service should agree to this change in filing status when the taxpayer does not provide any reason for the change or if one of the taxpayers is or has been participating in illegal activity.

Discussion

The Service Center questions the authority to make the change in filing status based on Publication 17 and on § 6013(f)(4). At page 21, Publication 17[5] addresses the filing of separate returns after joint returns and states:

> Once you file a joint return, you cannot choose to file separate returns for that year after the due date of the return.
>
> **Exception**. A personal representative for a decedent may change from a joint return elected by the surviving spouse to a separate return for the decedent. ...

Section 6013(f)(4) states:

> **(4) Making of election: revocation.** An election described in this subsection with respect to any taxable year may be made by filing a joint return in accordance with subsection (a) and under such regulations as may be prescribed by the Secretary. Such an election may be revoked by either spouse on or before the due date (including extensions) for such taxable year, and, in the case of an executor or administrator, may be revoked by disaffirming as provided in the last sentence of subsection (a)(3).

However, this election/revocation authority is found within a subsection entitled, "Joint return where individual is in missing status." From a review of § 6013(f)(1), we conclude that the above election/revocation authority only applies to a married couple where one spouse is missing in action as a result of service in a combat zone.

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[5] We have used the Publication 17 for use in preparing 1997 returns.

When we focus on the rules for changing filing status, we find that the statute provides general rules for when a taxpayer may change from married filing separately status to married filing jointly status at § 6013(b)(2); however, no such rules are provided for the reverse. The only circumstance in which an election to file a joint return may be disaffirmed is where a surviving spouse filed a joint return, and within one year from the due date of the return, the decedent's personal representative files a separate return pursuant to § 6013(a)(3). In any other case, Treasury regulations specifically prohibit changing the election from joint to married filing separate after the due date for the return has passed. See Treas. Reg. § 1.6013-1(a)(1), which states in relevant part:

> For any taxable year with respect to which a joint return has been filed, separate returns shall not be made by the spouses after the time for filing the return of either has expired. ...

While no authority exists for changing the election from married filing joint to married filing separate, the taxpayer does have some avenue for relief. If the taxpayer has filed a joint return and then discovers significant problems with the return, the injured spouse can attempt to qualify for relief as an "innocent spouse" under § 6013(e).

In answer to the first question, we conclude that the taxpayer would not have the right to change from the joint election after the return due date unless they never met the requirements to make a joint election. Facts that would generally show that the taxpayer could not make a joint election include:

1. the taxpayers were not married at the end of the tax year, § 6013(a);

2. one of the spouses was a nonresident alien during the tax year, § 6013(a)(1);

3. the spouses have different taxable year, § 6013(a)(2).

In answer to the second question, we conclude that the involvement of one of the taxpayer spouse in criminal activity does not provide a basis for changing from a joint election to the status of married filing separate. The taxpayer would need to use the relief provided for an "innocent spouse" under § 6013(e).

* * *

If you have comments or further questions about Issue 3 or § 6020, please contact John Moran at (202) 622-4940. If you have comments or further questions about other issues, please contact Catherine Prohofsky at (202) 622-4930.

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by_____/s/_____
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