OFFICE OF
CHIEF COUNSEL

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224
April 30, 2002

Number: **200235002**
Release Date: 8/30/2002
CC:PA:APJP:B01

UILC: 6011.00-00

INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

MEMORANDUM FOR JORDAN S. MUSEN
ASSOCIATE AREA COUNSEL CC:SB:8:THO

FROM: James C. Gibbons
Branch Chief CC:PA:APJP:B01

SUBJECT:

This Chief Counsel Advice responds to your memorandum dated February 1, 2002. In accordance with I.R.C. § 6110(k)(3), this Chief Counsel Advice should not be cited as precedent.

LEGEND

Mr. Petitioner:
Mrs. Petitioner:
$A:
$B:
Year 1:
Year 2:
Year 3:
Year 5:
Month X:
Month Y:

ISSUES

1. Whether the Petitioners provided the Internal Revenue Service ("IRS") with a valid return for their Year 1 tax year, where the Petitioners added the language "Estimated Return" at the top of their Year 1 Form 1040.

2. Whether Petitioners filed their Year 1 Form 1040 with the IRS, where the Petitioners submitted their return to a revenue agent on or about Month Y Year 3.

3. Assuming that Petitioners failed to file a valid return, whether I.R.C. § 66(b) applies to this case.

CONCLUSIONS

1. The Form 1040 that is labeled "Estimated Return" is not a valid tax return. By simply estimating their Year 1 income, the Petitioners have failed to provide the IRS with sufficient information to calculate the Petitioners' tax liability. In addition, Petitioners have failed to make an honest and reasonable attempt to satisfy the requirements of the tax law.

2. Petitioners did not file their Year 1 Form 1040 where they simply submitted their return to a revenue agent.

3. Under the facts provided, I.R.C. § 66(b) does not apply to this case.

FACTS

Petitioners' Year 1 tax year was selected for examination. The IRS did not have any record of receiving a tax return for Petitioners' Year 1 tax year. In Year 2, the IRS requested a copy of Petitioners' Year 1 tax return. In Month X of Year 3, the IRS filed a substitute for return for Petitioners' Year 1 tax year. In Month Y of Year 3, the Petitioners provided the examining revenue agent with their Year 1 Form 1040.

Petitioners added the language "Estimated Return" at the top of the first page of the Form 1040. The only income item reported on the Form 1040 is $A in taxable dividends from a corporation. The Petitioners reported itemized deductions of $B, and after deducting $B from $A, the Petitioners reported a tax liability of zero. In addition, attached to Petitioners' Form 1040 was a letter from the Petitioners' tax return preparer, which states that the Form 1040 is an estimated return based on "very limited information available" due to the unavailability of the Petitioners' records. According to the letter, the Petitioners' records had been seized by two separate grand juries. In addition, the letter states that the corporation that paid dividends to the Petitioners had its computer records destroyed by a former employee of the corporation.

The Form 1040 was signed by both Mr. and Mrs. Petitioner. Mr. Petitioner listed his occupation as "RETIRED & PARTTIME [sic] CONSULTING." Mrs. Petitioner listed her occupation as "GENERAL MGR."

Because the Form 1040 was labeled as an "Estimated Return," the revenue agent did not process the Petitioners' Year 1 Form 1040. In Year 5, the IRS issued separate statutory notices of deficiency to Mr. and Mrs. Petitioner for their Year 1 tax year. Mr. Petitioner's notice of deficiency made an adjustment for the $A in taxable dividends reported on the Petitioners' Year 1 Form 1040, as well as an adjustment for other taxable income that third parties reported to the IRS as having been paid Mr. Petitioner during Year 1. In the statutory notice of deficiency mailed to Mrs. Petitioner, the IRS again made an adjustment for $A in taxable dividends as well as adjustments for other taxable income that third parties reported to the IRS as having been paid Mrs. Petitioner during Year 1.

LAW AND ANALYSIS

The Form 1040 Provided by Petitioner in Month Y of Year 3 does not Constitute a Tax Return

In general, individuals are required to file a tax return every year. I.R.C. § 6012(a)(1)(A). Such return must conform with the forms and regulations prescribed by the Secretary. I.R.C. § 6011(a). In addition, all taxpayers are expected to carefully prepare their returns, and "set forth fully and clearly" all information required by such form. Treas. Reg. § 1.6011-1(b). The Secretary has prescribed that the Form 1040 is the form that individuals must use when they file a return. Williams v. Commissioner, 114 T.C. 136 (2000); Steines v. Commissioner, T.C. Memo. 1991-588.

Here, the Petitioners received a sufficient amount of income requiring them to file a tax return for Year 1. In addition, Petitioners are individuals, and are therefore required to use the Form 1040.

Petitioners did mail to an IRS revenue agent a Form 1040 for their Year 1 tax year. At the top of the first page of the Form 1040, the Petitioners wrote "Estimated Return". Such augmentation calls into question the validity of the return.

The U.S. Supreme Court has allowed documents that do not conform with forms prescribed by the Secretary to be treated as valid returns. See Badaracco v. Commissioner, 464 U.S. 386 (1984); Zellerbach Paper Co. v. Helvering, 293 U.S. 172 (1934); Florsheim Bros. Drygoods Co. v. United States, 280 U.S. 453 (1930).

The Tax Court, in Beard v. Commissioner, 82 T.C. 766, 777 (1984) aff'd 793 F.2d 139 (6th Cir. 1986), presented the Supreme Court's requirements in the following four-part test:

> First, there must be sufficient data to calculate [the] tax liability; second, the document must purport to be a return; third, there must be an honest and reasonable attempt to satisfy the requirements of the tax law; and fourth, the taxpayer must execute the return under penalties of perjury.

As suggested by the Beard test, the determination of whether a document submitted by a taxpayer is a valid tax return depends on the facts and circumstances of each specific document. The Ninth Circuit has held that a return that contains nothing but zeroes constitutes a valid return. See United States v. Long, 618 F.2d 74 (9th Cir. 1980).

Further, in certain circumstances, the courts have allowed as a valid return Form 1040s that have language that was added to the form by a taxpayer. See McCormick v. Peterson, CV93-2157 (E.D.N.Y. 1993), 94-1 U.S. Tax Cas. (CCH) ¶50,026 (1993), acq. 1998-2 C.B. 1 (The court allowed as valid a return where the taxpayer added the words "under protest" beneath his signature on the Form 1040.); Berger v. Commissioner, T.C. Memo. 1996-76 (Adding a disclaimer statement that the taxpayer was signing the return "under duress by court order" did not invalidate the return.); Todd v. United States, 849 F.2d 365 (9th Cir. 1988) (Adding "signed involuntarily under penalty of statutory punishment" below the signature did not render the Form 1040 subject to the I.R.C. § 6702 frivolous return penalty.)

There are situations, however, where a taxpayer will add language to a Form 1040 that renders such form invalid. In Jenkins v. Commissioner T.C. Memo. 1989-617, the taxpayer filed a return with a modified jurat. Instead of declaring under penalty of perjury that her return was "true, correct and complete", the taxpayer instead declared under penalty of perjury that her return was estimated. Id.

The Tax Court held that taxpayer's return was invalid. Id.

> We know of no authority that holds that taxpayers need only estimate their taxes on their return. A person who merely estimates her taxes is not making an 'honest and reasonable attempt' to meet the requirements of the Code. Also, given the language on the return that petitioner's taxes were 'estimated,' respondent would not be able to calculate petitioner's actual tax liability.

Id.

The United States Court of Appeals for the Ninth Circuit, the appellate venue for the instant case, has held that "the filing of an admittedly incomplete, inaccurate, and estimated return does not of itself relieve the tardy taxpayer of liability for a [failure to file a return] penalty." Ferrando v. United States, 242 F.2d 582, 588 (9th Cir. 1957).

In addition, other courts have also held returns invalid that are labeled either a "tentative return" or where a taxpayer only approximates his income. See National Contracting Co. v. Commissioner, 105 F.2d 488 (8th Cir. 1939)(Corporation filed a Form 1120 that was signed by the corporation's president and stamped "Tentative Return." The Court held that such return was not a valid tax return.); In re George Colin Mulcahy, 260 B.R. 612, 614-615 (Bankr. D. Mass. March 8, 2001)(For Debtor's 1988 tax year, Debtor submitted a Form 1040 which listed both his adjusted gross income and total income as being "approximately $16,000-$18,000". For his 1989 tax year, Debtor submitted a Form 1040 in which he reported his taxable income as approximately $14,000.00. This was the only line completed on his 1989 Form 1040. The Court held that neither of these returns were valid tax returns.)

Applying the Beard test as well as other relevant case law, the Petitioners have failed to file a valid tax return for their Year 1 tax year. The first part of the Beard test requires that taxpayers provide sufficient information for the IRS to calculate the taxpayers' actual tax liability. On the first page of the Form 1040, the Petitioners stated that their Form 1040 was only estimated. Further, the letter attached to the return, which represents that the return was prepared with very limited information because the Petitioners' records had been seized by two separate grand juries, also calls into question the accuracy of the $A reported as taxable dividends.

Similar to the return that was filed in Jenkins, the Petitioners, utilizing estimates, have made it impossible for the IRS to compute the Petitioners' actual Year 1 tax liability. Accordingly, Petitioners have failed to meet the first part of the Beard test.

The third part of the Beard test is that the taxpayers must make an "honest and reasonable attempt to satisfy the requirements of the tax law." Again, as the Tax Court held in Jenkins, a taxpayer who simply estimates his taxes has not made "an honest and reasonable attempt to satisfy the requirements of the tax law" required by the Beard test.

Further, Petitioners' tax return preparer claims that the Petitioners' Year 1 tax return could not be accurately computed because Petitioners' records have been seized. There is no evidence, however, regarding what steps the Petitioners have taken to obtain copies of the seized records, or what method the Petitioners used to reconstruct the taxable income that was actually reported on their Year 1 return.

Finally, there is other evidence on the face of the return that calls into question whether Petitioners have made an honest and reasonable attempt at preparing their Year 1 tax return. Both Mr. and Mrs. Petitioner describe themselves as having occupations. Mr. Petitioner claims to be a part-time consultant and Mrs. Petitioner claims to be a general manager. There is no evidence regarding the income either person received during Year 1 from their respective occupations. Line 7 of the Form 1040, which is where taxpayers would normally list “wages, salaries, tips, etc.,” has been left blank. Line 12 of the Form 1040, which is where taxpayers would normally list “business income or (loss),” has also been left blank. Further, no Schedule C was attached to Petitioners’ Year 1 Form 1040.

Unlike the taxpayers in Long, where the taxpayers placed zeroes on each line, the Petitioners in this case have simply left such lines blank. Entering nothing while asserting to be gainfully occupied does not evince an honest and reasonable attempt at preparing an accurate Year 1 tax return.

Based on the case law above, the Petitioners have failed to provide to the IRS a valid tax return for their Year 1 tax year to the IRS.

Petitioners Failed to Properly File Their Year 1 Tax Return

Apart from the validity of Petitioners’ Year 1 Form 1040, the Petitioners have failed to comply with the filing requirements of the Internal Revenue Code.

Individuals are generally required to file a tax return every year. I.R.C. § 6012(a)(1)(A). Where a taxpayer is required to file a return, that taxpayer is required to file such return:

> (i) in the internal revenue district in which is located the legal residence or principal place of business of the person making the return, or
>
> (ii) at a service center serving the internal revenue district referred to in clause (i), as the Secretary may by regulations designate.

I.R.C. § 6091(b)(1)(A)(i) and (ii). Further, “whenever instructions applicable to income tax returns provide that the returns be filed with a service center, the returns must be so filed in accordance with the instructions.” Treas. Reg. § 1.6091-2(c). In the alternative, Treas. Reg. 1.6091-2(d)(1) provides that the return may be hand carried to the district director (or with any person assigned the administrative supervision of an area, zone local office constitution a permanent post of duty or within the internal revenue district of such director).

In this case, the Petitioners did not hand carry their Year 1 tax return to the district director, any person assigned the administrative supervision of an area, zone or

post of duty, or file their Year 1 tax return with the appropriate service center. Instead the Petitioners mailed their return to the revenue agent examining their Year 1 tax return.

The courts have held that where a taxpayer provides his or her tax return to a revenue agent, such return has not been properly filed as required by I.R.C. § 6901(b)(1)(A). Espinoza v. Commissioner, 78 T.C. 412 (1982). See also Friedmann v. Commissioner, T.C. Memo. 2001-207 (The "revenue agent was not the prescribed place for filing" taxpayer's 1989 and 1990 tax returns pursuant to I.R.C. § 6091(b)(1).); Metals Refining Ltd. v. Commissioner, T.C. Memo. 1993-115 (Taxpayer's supposed delivery of returns to IRS agents does not comply with the requirements of I.R.C. § 6091.); Green v. Commissioner, T.C. Memo. 1993-152, aff'd without opinion 33 F.3d 1378 (5th Cir. 1994) ("Petitioner contends that he gave a copy of his 1983 return to an IRS employee when he was imprisoned in Mississippi. However, giving a delinquent return to an IRS agent does not constitute a filing."); Kotovic v. Commissioner, T.C. Memo. 1959-177.

As supported by the case law, because the Petitioners mailed their Year 1 return to the examining revenue agent rather than to the appropriate Service Center, the Petitioners have not properly filed their Year 1 return as required by I.R.C. § 6091. Accordingly, the Petitioners have not filed a tax return for their Year 1 tax year.

I.R.C. § 66 Does not Apply to this Case

I.R.C. § 66 provides for the treatment of income in community property states. Pursuant to this section, the:

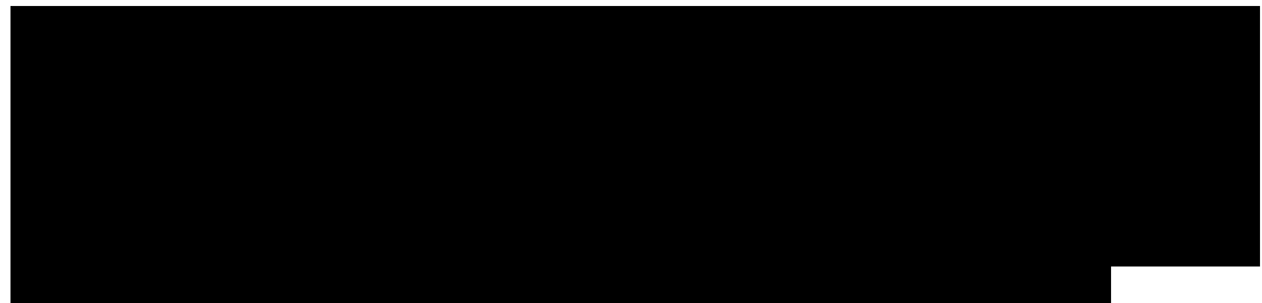
> Secretary may disallow the benefits of any community property law to any taxpayer with respect to any income if such taxpayer acted as if solely entitled to such income and failed to notify the taxpayer's spouse before the due date (including extensions) for filing the return for the taxable year in which the income was derived of the nature and amount of such income.

I.R.C. § 66(b).

We do not find it necessary to rely upon I.R.C. § 66(b) in this case. The deficiency notices take a whipsaw position and make an adjustment of $A on each spouse's notice. Taking this position ensures that the spouses cannot claim that $A, or some portion of it, belongs to the spouse against whom an adjustment was not made on that separate spouse's respective statutory notice of deficiency. With this position, there is no need to disregard community property laws with respect to either Mr. or Mrs. Petitioner.

Additionally, we note that for I.R.C. § 66(b) to apply to a taxpayer, respondent must show that (1) the taxpayer acted as if solely entitled to the income in question and (2) that the taxpayer failed to notify his or her spouse of the nature and amount of such income prior to the due date (including extensions) for filing the return. Thus, I.R.C. § 66 would be applicable only if there were evidence that one of the petitioners acted as if solely entitled to the dividend income. See Layman v. Commissioner, T.C. Memo. 1999-218. To date, our office is not aware of any such evidence.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS



This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

Please call if you have any further questions.