

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

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to: Carolyn A. Schenck
General Attorney (Los Angeles, Group 3)
(Small Business/Self-Employed)

from: Charles A. Hall
Senior Technician Reviewer, Procedure & Administration, Branch 1

subject: Timeliness of Refund Claim

This Chief Counsel Advice responds to your request for assistance. This advice may not be used or cited as precedent.

LEGEND

Taxpayer =

Year 1 =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

Date 6 =

Date 7 =

Date 8 =

\$X =

ISSUE

Can a claim for refund made on a late filed original return without a signature, which is postmarked within three years of the extended due date of the return, be considered “timely” filed when a faxed signature is not associated with the unsigned return until more than three years after the extended due date for filing the return?

CONCLUSION

A claim for refund is not timely if it is made on a late filed original return without a signature, which is postmarked within three years of the extended due date of the return, where a faxed signature is not associated with the unsigned return until more than three years after the extended due date for filing the return.

FACTS

Taxpayer, an individual, filed Forms 1040 claiming a Fifth Amendment privilege for a number of tax years. Taxpayer subsequently submitted amended Forms 1040 for those years that were labeled “protective claim” and followed the same pattern as the initial Forms 1040. Taxpayer submitted a third version of a Form 1040 for Year 1 that the Service eventually processed and posted. This is the Form 1040 at issue in this advice.

Taxpayer’s third Form 1040 was postmarked on Tuesday, Date 1, and sent unsigned to the incorrect service center (Taxpayer sent the Form 1040 to the Memphis Service Center when Taxpayer should have sent it to the Atlanta Service Center). On Monday, Date 2, a date that fell after the expiration of the refund statute period on Friday, Date 3, the postmarked return was received at the Memphis Service Center. Taxpayer faxed a signed page two of the Form 1040 to the Memphis Service Center. The top of the faxed signature page indicates that the fax was first sent from what appears to be Taxpayer’s fax machine to a third party’s fax machine at approximately 5:10 p.m. on Thursday, Date 4, a date that fell before the expiration of the refund statute period on Friday, Date 3. It appears that the faxed page two of the Form 1040 was re-faxed from this third party’s fax machine at approximately 5:38 p.m. on Date 4. Nothing in the Service’s records, however, indicates when the Service received this signed page two at the Memphis Service Center. Furthermore, Taxpayer has not provided any additional documentation confirming that the faxed date (Date 4) on this signature page was accurate or that the fax was received by the Memphis Service Center on Date 4. At some point after the unsigned return was received on Date 2, the return and the faxed signature page were associated together. This appears to have occurred on Date 5, the date the filing of the Form 1040 was recorded on masterfile (TC 150). No other information has been provided that might explain any reason for either Taxpayer’s piecemeal submissions or as to why Taxpayer submitted the documents to the wrong service center.

Based on a limited set of facts that included the filing of the three different Forms 1040 for Year 1, but not the piecemeal submission of the third version of the Form 1040 and the fact that this Form 1040 was not signed, this Office previously concluded that this third Form 1040 satisfied the test set forth in Beard v. Commissioner, 82 T.C. 766

(1984), aff'd per curiam, 793 F.2d 139 (6th Cir. 1986), and was a valid return for purposes of the commencement of the statute of limitations for assessment of taxes. That advice, however, was concerned solely with the extent to which amounts reported on the numerous Fifth Amendment returns were sufficient for purposes of the “substantial compliance” prong of the Beard test. The advice concluded that the return at issue in this case was the only return which contained sufficient data to calculate tax liability for purposes of the Beard test. The fact that the return was not signed was not a fact in issue in the first advice.

The Form 1040 at issue, which was submitted to the Memphis Service Center, showed an overpayment in excess of \$X based on estimated tax payments for Year 1 that exceeded the tax reported as due. Taxpayer had timely requested an extension of time to file a return for Year 1. Thus, the statute of limitations for claiming a refund for Year 1 expired on Date 3 (three years plus extensions of time to file from the date the estimated tax payments were deemed paid). Based on these more developed facts, you have asked whether Taxpayer has filed a timely claim for refund so that Taxpayer is eligible for a refund of the overpayment shown on the return. This advice may not be used or cited as precedent.

LAW AND ANALYSIS

Can a claim for refund made on a late filed original return without a signature, which is postmarked within three years of the extended due date of the return, be considered “timely” filed where a faxed signature is not associated with the unsigned return until more than three years after the extended due date for filing the return?

A document is “filed” with the federal government when it is actually physically delivered to and received by the proper federal agency or official. See United States v. Lombardo, 241 U.S. 73, 76-7 (1916). Although Lombardo is not a tax case, it is cited as the rule for when a return is considered filed with the Service. See Berlin v. Commissioner, 59 F.2d 996 (2nd Cir. 1932); Poynor v. Commissioner, 81 F.2d 521 (5th Cir 1936). In this case, a valid return disclosing the overpayment was filed with the Service no earlier than Date 5, the date on which the faxed signature page was associated with the unsigned Form 1040 in the Memphis Service Center.¹ See Beard v. Commissioner, 82 T.C. 766 (1984). Section 7502(a) of the Code provides an exception to the general rule for when a document is considered received by the Service. Under section 7502(a), the filing date is deemed to be the postmark date if a document is received after the due date (including extensions) and the document is postmarked on

¹ It could be argued that the Form 1040 was not actually “filed” with the Service until after Date 5, as this document was sent to the incorrect IRS Service Center (correct Service Center was in Atlanta). See Winnett v. Commissioner, 96 T.C. 802 (1991) (statute of limitations on assessment did not begin to run when the Service received the taxpayers’ return, which was mailed to the wrong Service Center per section 6091). Furthermore, this memorandum offers no opinion on whether the faxed signature is sufficient to create a valid return and claim for refund because, even assuming that it does, we conclude that any such claim for refund was filed after the expiration of the statute of limitations set forth in section 6511.

or before the due date. Thus, timely mailing is considered timely filing (postmark rule). As the Form 1040 in this case was not postmarked and sent until well after Date 6, the extended due date for the Year 1 return, section 7502 would not apply to the return.

Although section 7502 does not apply to a return, it potentially could apply to a claim for refund disclosed on the return if: (1) the date of the postmark on the envelope containing the return with a claim for refund is within the period that is three years (plus the period of any extension of time to file) from the day the tax is paid or considered paid, (2) the claim for refund is delivered after this three-year period, and (3) the conditions of section 7502 are otherwise met. Treas. Reg. § 301.7502-1(f)(1); see also Weisbart v. United States, 222 F.3d 93 (2nd Cir. 2000). As discussed below, this provision does not apply to the Form 1040 at issue in this case because section 7502 does not apply to the claim for refund on the Form 1040.

Section 301.7502-1(f)(1) references section 301.6402-3(a)(5) for the rules regarding when an original income tax return may constitute a claim for credit or refund of income tax. Section 301.6402-3 provides:

A properly executed individual, fiduciary, or corporation original income tax return or an amended return (on 1040X or 1120X if applicable) shall constitute a claim for refund or credit within the meaning of section 6402 and section 6511 for the amount of the overpayment disclosed by such return (or amended return). For purposes of section 6511, such claim shall be considered as filed on the date on which such return (or amended return) is considered as filed, except that if the requirements of § 301.7502-1, relating to timely mailing treated as timely filing are met, the claim shall be considered to be filed on the date of the postmark stamped on the cover in which the return (or amended return) was mailed.

Treas. Reg. § 301.6402-3(a)(5) (emphasis added). In this case, the Form 1040 postmarked Date 1 was not a properly executed income tax return. The unsigned Form 1040 was not a valid return pursuant to the Tax Court's test as set forth in Beard, regarding what constitutes a return for statute of limitations purposes. According to Beard, a return must be executed (signed) under penalties of perjury. Id. at 777. Because the Form 1040 postmarked Date 1 was not signed, it did not constitute a valid filed return until, at the earliest, it was associated with the faxed signature page on Date 5. Accordingly, the special rule in section 301.7502-1(f) does not apply and the claim for refund on the Form 1040 is not filed until actually received by the Service. Thus, both the return and the claim for refund are filed on the same date, no earlier than Date 5.

As Taxpayer's refund claim made on the Form 1040 at issue is considered filed at the same time as the return, the claim is considered filed within three years of the return and is timely under the three-year rule of section 6511(a). See Rev. Rul. 76-511, 1976-2 C.B. 248. Taxpayer's claim for refund, however, is limited to the tax paid during the

three-year period (including any extensions of time to file) preceding the filing of the claim. I.R.C. § 6511(b)(2)(A). Thus, this lookback period would reach back until Date 7. Under section 6513(b)(2), the estimated tax is deemed paid on the last day prescribed for filing the return determined without regard to any extension of time to file, i.e., Date 8. Therefore, the amount of refund Taxpayer is allowed is limited to zero.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS



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Please call (202) 622-4940 if you have any further questions.