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Internal Revenue Service
Memorandum

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subject: Section 6501 Issues for Common-Law Employers That Use Third-Party Payors

This Chief Counsel Advice responds to your request for assistance and was drafted in coordination with the Office of Associate Chief Counsel (Procedures & Administration). This advice may not be used or cited as precedent.

ISSUE

Whether a third-party filing of an employer's employment tax return starts the period of limitations on assessment under section 6501 with respect to the employer in the four scenarios discussed below?

CONCLUSION

As discussed below, where the third party filing is unauthorized or does not meet the minimum requirements of a sufficient return, a third-party filing of an employment tax return will generally not start the period of limitations on assessment under section 6501 with respect to the employer.

BACKGROUND

Employers generally are required to deduct and withhold federal income tax and Federal Insurance Contributions Act (FICA) taxes from wages paid to their employees

under sections 3402(a) and 3102, and are separately liable for the employer's share of FICA taxes under section 3111 (collectively referred to for purposes of this memorandum as employment taxes).[1] Sections 31.3102-1(d) and 31.3403-1 of the Treasury regulations establish that an employer is liable for the withholding and payment of employment taxes, whether or not amounts are actually withheld. Employers must also file employment tax returns reporting employment taxes for each employment tax return period. Generally, an employer files Form 941, *Employer's QUARTERLY Federal Tax Return*, to report wages the employer paid—during a quarter of a calendar year—that are subject to federal income tax withholding and FICA taxes. See I.R.C. § 6011; Treas. Reg. §§ 31.6011(a)-1(a)(1) and 31.6011(a)-4(a)(1).

For various reasons, an employer may choose to enter into an agreement with a third party to satisfy the employer's employment tax obligations, i.e., the third party ensures that the employer's withholding, reporting, and payment obligations are satisfied. The employer remains responsible to ensure that tax returns are filed and deposits and payments are made timely, even when the employer contracts with a third party to perform these acts. One common third-party arrangement is the Internal Revenue Service's authorization of an agent, at the employer's request, under section 3504, to perform acts required of the employer, including the filing of employment tax returns under the agent's employer identification number (EIN). Discussed more thoroughly below, the Service has established administrative procedures under which a payor may request authorization to file employment tax returns and perform other acts for the employer. Specifically, Rev. Proc. 2013-39, 2013-52 I.R.B. 830, provides the general procedures for a payor to request authorization to act as an agent under section 3504.

Another common third-party arrangement involves an employer who enters into agreement with a third party (such as a professional employer organization (PEO) or employee leasing company), under which the third-party payor performs the employment tax obligations of the employer-client, which includes the filing of employment tax returns under the third-party payor's EIN without receiving authorization from the IRS to do so.[2] In these cases, even though the employer and the third-party

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[1] Employers of railroad employees are required to deduct and withhold Railroad Retirement Tax Act (RRTA) taxes from their employees' compensation under section 3202, and are separately liable for the employer's share of RRTA taxes under section 3221. While the procedures described in this memo related to section 3504 apply also to railroad employers, for purposes of this memorandum the term "employment taxes" only refers to FICA taxes and income tax withholding.

[2] We do not address in this memorandum other common third-party arrangements involving payroll service providers (PSPs) or reporting agents. PSPs prepare employment tax returns on behalf of an employer (including Form 941) using the EIN of the employer. A reporting agent is generally a PSP that is authorized to sign and file certain employment tax returns on behalf of the employer using the employer's EIN, including Form 941. The Service has prescribed Form 8655, *Reporting Agent Authorization*, as the appropriate authorization form for an employer to use to designate a PSP as a reporting agent. Additional information concerning reporting agent authorizations may be found in Rev. Proc. 2012-32, 2012-34 I.R.B. 267. A reporting agent is not liable under subtitle C of the Code as the employer, or as an agent of the employer, for the employer's employment taxes. An employer's use of a reporting agent does not relieve the employer of its employment tax obligations or liability for the taxes. Additionally, for purposes of this memorandum, we are assuming that none of the third-party payors

payor do not obtain an approved Form 2678, *Employer/Payer Appointment of Agent*, pursuant to section 31.3504-1 (discussed in more detail, below), the Service may designate certain third-party payors under section 31.3504-2 to perform the acts required of an employer with respect to wages or compensation paid by the third-party payor to any individual performing services for any employer-client.

Because section 3504 agents and other third-party payors file employment tax returns on behalf of an employer using the agent's or the third-party payor's EIN, there is a question as to whether the third party's filing of the employment tax return should start the period of limitations on assessment under section 6501 with respect to the employer in each of the following four scenarios.

SCENARIOS

(1) A third party has an approved Form 2678 from the Service authorizing it to act as an agent on behalf of an employer. In accordance with the instructions for Form 941 and Revenue Procedure 2013-39, the agent files an aggregate Form 941 on behalf of the employer (as well as the other employers for whom it has an approved Form 2678) using its own EIN and attaches Schedule R (Form 941), *Allocation Schedule for Aggregate Form 941 Filers*. On the Schedule R, the agent lists the name and EIN of each individual employer and allocates the amounts of wages, taxes, and payments reported on the aggregate Form 941 to each individual employer for whom it is authorized to file.

(2) A third party has an approved Form 2678 from the Service authorizing it to act as an agent on behalf of an employer. In accordance with the instructions for Form 941 and Revenue Procedure 2013-39, the agent files an aggregate Form 941 on behalf of the employer (as well as the other employers for whom it has an approved Form 2678) using its own EIN. However, the agent does not attach Schedule R to the aggregate Form 941 allocating the amounts of wages, taxes, and payments reported on the aggregate Form 941 to each individual employer for whom it is authorized to file as required by the instructions for Form 941 and Revenue Procedure 2013-39.

(3) A third-party payor (for example, a professional employer organization (PEO)) without an approved Form 2678 from the Service files an aggregate Form 941 on behalf of an employer-client (as well as several other employer-clients) using its own EIN. The third-party payor does not attach Schedule R to the aggregate Form 941 allocating the amounts of wages, taxes, and payments reported on the aggregate Form 941 to each individual employer-client. In accordance with Treasury regulation section 31.3504-2, the Service designates the third-party

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described in the Scenarios are considered section 3401(d)(1) employers under which the liability for all the employment taxes due on wages shifts from the common law employer to the third-party payor with control of the payment of those wages.

payor to perform the acts required of each employer-client with respect to wages or compensation paid by the third-party payor to individuals performing services for each employer-client pursuant to a service agreement (as defined by regulation section 31.3504-2) between the third-party payor and each employer-client. The employer-client does not file a Form 941 using its own EIN.

(4) A third-party payor (for example a PEO) without an approved Form 2678 from the Service files a Form 941 using its own EIN, which purportedly includes wages or compensation that it paid for an employer-client to individuals performing services for the employer-client. The third-party payor and the employer-client did not enter into a service agreement (as defined by regulation section 31.3504-2). Thus, the Service does not designate the third-party payor to perform acts required of each employer under section 31.3504-2 with respect to the employer-client. The employer-client does not file a Form 941 using its own EIN.

LAW

Employment Tax Filing Requirements

Section 6011 provides that, when required by regulations prescribed by the Secretary, any person made liable for any tax imposed by this title, or with respect to the collection thereof, shall make a return or statement according to the forms and the regulations prescribed by the Secretary. Every person required to make a return or statement shall include therein the information required by such forms and regulations.
The Service's broad authority to prescribe the manner of filing has been recognized by the Supreme Court. In *Commissioner v. Lane-Wells Co*., the Court provided:

> Congress has given discretion to the Commissioner to prescribe by regulation forms of returns and has made it the duty of the taxpayer to comply. It thus implements the system of self-assessment which is so largely the basis of our American scheme of income taxation. The purpose is not alone to get tax information in some form but also to get it with such uniformity, completeness, and arrangement that the physical task of handling and verifying returns may be readily accomplished.

321 U.S. 219, 223 (1994).

Section 31.6011(a)-1(a) of the Employment Tax Regulations requires, in general, that an employer make a return for each calendar quarter on Form 941 in which it pays wages subject to the tax imposed by the Federal Insurance Contributions Act. Pursuant to section 31.6011(a)-4 of the Employment Tax Regulations, in general, every person required to make a return on Form 941 of federal income tax withheld from wages must make a return for each calendar quarter in which the person is required to deduct and withhold such tax.

Further, the Code affords the Secretary broad authority to prescribe the manner in which a return must be executed. See I.R.C. § 6061; *Weiner v. United States*, 255 F. Supp.2d. 624, 645 (S.D. Tex. 2002) ("In general, signature requirements for returns have been strictly enforced."). Section 6061 provides "any return, statement, or other document required to be made under any provision of the internal revenue laws or regulations shall be signed in accordance with forms or regulations prescribed by the Secretary." The regulations promulgated under section 6061 provide that employment tax returns must be signed by:

a) the individual, if the person required to make the return is an individual;

b) the president, vice president, or other principal officer, if the person required to make the return is a corporation;

c) a responsible and duly authorized member or officer having knowledge of its affairs, if the person required to make the return is a partnership or other unincorporated organization; or

d) the fiduciary, if the person required to make the return is a trust or estate.

Treas. Reg. § 31.6011-1.

Returns may also be signed for the taxpayer by a duly authorized agent in accordance with section 31.6011(a)-7 of the regulations.

Section 301.6061-1(b) of the Regulations on Procedure and Administration provides that the Secretary may prescribe in forms, instructions, or other appropriate guidance, the method of signing any return, statement, or other document required to be made under any provision of the internal revenue laws or regulations.

Although the employer is responsible for paying employment taxes and filing employment tax returns, section 3504 of the Code authorizes the Secretary to promulgate regulations to authorize a fiduciary, agent, or other person who has the control of, receives, has custody of, disposes of, or pays the wages of an employee or group of employees, employed by one or more employers, to perform certain specified acts required of employers. All provisions of law (including penalties) applicable with respect to an employer are applicable to the agent and remain applicable to the employer. I.R.C. § 3504. Accordingly, both the agent and employer are liable for the employment taxes and penalties associated with the employer's employment tax obligations undertaken by the agent. Id. Section 31.3504-1(a) provides that the Service may authorize a person who pays, controls, receives, has custody of, or disposes of wages or compensation of an employee or group of employees employed by one or more employers as an agent. Applications for authorization to act as agent shall be signed by the agent and employer and made on the form prescribed by the Service, and shall be filed with the Service as prescribed in the instructions to the form and other

applicable guidance. Id.

Revenue Procedure 2013-39 sets forth the procedures that third parties are required to follow to request authorization to act as an agent under section 3504. To request that the Service authorize an agent under section 31.3504-1 to perform acts required of an employer, the parties must use Form 2678. Rev. Proc. 2013-39, § 3.01. The agent files Form 2678 with the Service to request approval. Id. at § 3.02. If the Service approves the request, it sends a letter of approval to the agent and employer. Id. at §3.03

The agent with an approved Form 2678 is required to file one aggregate Form 941 using the agent's EIN for each tax-return period reporting the wages and employment taxes on the wages paid to its employees, and the wages and employment taxes on the wages paid by the agent to the employees of each employer for whom the agent is authorized to act (regardless of the number of employers for whom the agent acts). Id. at §§ 4.01 and 4.02. The agent must also complete an allocation schedule and attach it to each aggregate return. Id. at 4.03. On the allocation schedule, the agent lists the name and EIN of each employer for whom the agent is authorized to act and allocates the wages, taxes, and payments reported on the aggregate return to each employer. Id. Effective for periods on or after January 1, 2010, the Service has designated Schedule R (Form 941), *Allocation Schedule for Aggregate Return Filers*, as the allocation schedule to attach to an aggregate Form 941. Id.

Additionally, pursuant to section 31.3504-2, even if an employer does not obtain an approved Form 2678 that authorizes a third-party to act as the employer's agent, the Service will designate certain third-party payors to perform actions required of an employer. Specially, when an employer enters into a service agreement (as defined by regulation section 31.3504-2[3]) with a third-party payor under which the payor performs the employment tax obligations of the employer-client with regard to wages or compensation paid by the payor to individuals performing services for the employer-client, the Service will designate the payor to perform certain actions required of an employer (unless one of the enumerated exceptions in the regulations applies). Id. Generally, in this scenario, the third-party payor remits the wages to employees and, without any authorization from the Service to do so, takes steps to ensure the employer's employment tax withholding, reporting, and payment obligations are satisfied. In this scenario, the third-party payor files an aggregate Form 941 using the third-party payor's EIN rather than the employer's.

Consistent with the rules relating to agents authorized under section 31.3504-1(a), if the Service designates a payor to perform the acts required of an employer, all provisions of

[3] The term service agreement means a written or oral agreement pursuant to which the payor: (1) asserts it is the employer (or co-employer) of individuals performing services for the client, (2) pays wages or compensation to the individuals for services the individuals performed for the client, and (3) assumes responsibility to collect, report, and pay, or assumes liability for, any employment taxes with respect to the wages or compensation paid by the payor to the individuals who performed services for the client. Treas. Reg. § 31-3504-2(b)(2).

law (including penalties) applicable with respect to an employer are applicable to that payor. Treas. Reg. § 31.3504-2. However, each employer for whom the payor is designated to act remains subject to all provisions of law (including penalties) applicable to an employer. The regulations regarding the designation of a payor to perform the acts required of an employer are provided for purposes of allowing the Service to collect employment taxes from third-party payors based on the past actions of an employer and the third-party payor. The regulations are not intended to relieve an employer of any employment tax obligations under the Code. Moreover, the satisfaction of employment tax obligations is a non-delegable duty that cannot be altered by private agreements between an employer and a third-party payor. See In re *Professional Security Services*, Inc., 162 B.R. 901, 904 (Bankr. M.D. Fla. 1993) ("reasonable cause for failure to timely perform federal employment tax obligations cannot be proven merely by showing that the responsibility for performing this obligation has been assigned to an employee or agent of the taxpayer, because each taxpayer has a non-delegable duty to timely perform its federal employment tax obligations."). See also *Obstetrical & Gynecological Group, P.A. v. United States*, Civil Action No. 78-2352, 1979 WL 1419, at *3 (D.D.C. July 6, 1979).

Validity of Returns

Although the Service authorizes certain third-party payors to file employment tax returns on behalf of an employer, whether a document filed by either an employer or a third-party payor designated to perform the acts required of an employer constitutes a valid return is important for purposes of section 6501. The three-year limitations period for the Service to make an assessment generally begins to run with the filing of a return for a tax with respect to which a return must be filed. I.R.C. § 6501(a). However, employment tax returns, reporting social security and Medicare taxes or federal income tax withholding, filed with respect to a calendar year filed prior to April 15th of the succeeding calendar year are treated as filed on April 15th of the succeeding year for purposes of section 6501. I.R.C. § 6501(b)(2).

Despite the Service's broad authority to determine what information should be submitted with a tax return, and how that information should be submitted, the issue of what constitutes a valid return is frequently litigated. In an early case addressing the issue, the Supreme Court indicated that "[p]erfect accuracy or completeness is not necessary to rescue a return from nullity, if it purports to be a return, is sworn to as such, and evinces an honest and genuine endeavor to satisfy the law." *Zellerbach Paper Co. v. Helvering*, 293 U.S. 172, 180 (1934) (citation omitted).

Today, the test used by courts for determining whether a return is valid for assessment period of limitations purposes under section 6501 is outlined in *Beard v. Commissioner,* 82 T.C. 766, 777 (1984), aff'd per curiam, 793 F.2d 139 (6th Cir. 1986). These requirements are: (1) that sufficient data be supplied to calculate tax liability; (2) that the document purport to be a return; (3) that there be an honest and reasonable attempt to satisfy the requirements of the tax law; and (4) that the return be executed under

penalty of perjury. Id. This statement of the criteria, generally known as the Beard formulation, derives from a venerable line of Supreme Court cases. See *Zellerbach Paper Co. v. Helvering*, supra; *Florsheim Bros. Drygoods Co. v. United States*, 280 U.S. 453 (1930). The Beard formulation is generally known as the "substantial compliance" standard. If a return meets the "substantial compliance" standard, the return is a valid return for purposes of the statute of limitations on assessment.

Courts have held that an otherwise complete return, which provides the Service with sufficient information to compute the tax liability, will not be regarded as invalid merely because it lacks a required form or schedule. See, e.g., *Blount v. Commissioner*, 86 T.C. 383, 387 (1986), acq. in result, 1986-2 C.B. 1 (absence of Form W-2 does not invalidate return); *Zeier v. United States*, 80 F.3d 1360, 1363-64 (9th Cir. 1996) (absence of the requisite schedules did not prevent the Service from calculating the estate's tax liability; the estate-tax return was nevertheless valid). However, the courts have not established a "bright line" test to determine whether a return which lacks a required form or schedule, or that is in some other respect deficient, is nonetheless a valid return. Rather, courts typically apply the substantial compliance standard to the specific facts of each case. In determining whether a return that is defective in some respect constitutes a valid return, "[o]f crucial importance is whether the return, as filed, included sufficient information to allow the [Service] to compute the taxpayer's liability." See *Atlantic Land & Improvement Co. v. United States*, 790 F.2d 853, 858 (11th Cir. 1986), reh. denied, 798 F.2d 1420 (table). See also, e.g*., Bufferd v. Commissioner*, 506 U.S. 523, 528 (1993) ("tax returns that 'lack the data necessary for the computation and assessment of deficiencies' generally should not be regarded as triggering the period of assessment." (citations omitted)); *McCaskill v. Commissioner*, 77 T.C. 689, 696-97 (1981), action on decision, 1984-46 (July 16, 1984) ("It is often stated that a document constitutes a valid tax return if it contains sufficient data from which respondent can compute and assess a tax liability" (internal quotations omitted); *United States v. National Tank & Export Co*., 45 F.2d. 1005, 1006 (5th Cir. 1930), cert. denied, 283 U.S. 839 (1931) (consolidated return filed by corporations not entitled to file a consolidated return not sufficient to start the statute of limitation when the return did not separately state the items of income and deduction of each corporation).[4] But see *Commissioner v. Stetson & Ellison Co*., 43 F.2d 553 (3rd Cir. 1930) (a consolidated income tax return was sufficient to start the running of the period of limitations on assessment for individual members of the consolidated group when the members of the group were adequately disclosed on the return, but their items of income, invested capital, and deductions were not separated, although the items were included on the return).

ANALYSIS

[4] However, an improperly filed consolidated return that contains sufficient information to compute the tax liability of each corporation included in the return will start the running of the period of limitations on assessment. *See* Treas. Reg. § 1.1502-75(g)(ii); *General Manufacturing Corp. v. Commissioner*, 44 T.C. 513, 523 (1965), *acq.*, 1966-2 C.B. 3.

1. Form 2678 Agent Filing Aggregate Form 941 With Schedule R

In Scenario (1), likely all four of the Beard requirements are satisfied: the document purports to be a return, is signed, evinces an honest and reasonable attempt to satisfy the requirements of the law, and provides the Service with sufficient information to compute the agent's and the employer's employment tax liability for whom the agent is authorized to act. Although the employer did not itself file a return, an agent duly authorized by the Service to act for the employer filed an employment tax return on behalf of the employer. Treas. Reg. 31.3504-1; Rev. Proc. 2013-39. Further, because the agent attaches Schedule R to the aggregate Form 941, allocating wages and taxes reported on the return to its employer-clients, the Service has specific payroll and employment-tax information for each individual employer, and thus has sufficient information to determine the agent's, as well as the individual employer's employment tax liability. In essence, the Service receives the same information on the Schedule R as it would have received if the individual employer had filed its own Form 941. Thus, it is as if the employer itself filed the return. Therefore, in Scenario (1), the section 6501 period of limitations commences with respect to the employer when the agent files the aggregate Form 941 with the Schedule R attached.

2. **Form 2678 Agent Filing Aggregate Form 941 Without Schedule R**

Unlike Scenario (1), the Service could argue under the facts in Scenario (2) that the agent's filing of an aggregate Form 941 without the Schedule R attached is an insufficient filing to commence the period of limitations on assessment against the employer for whom the agent is authorized to act because it fails to satisfy the first Beard requirement. That is, the return fails to provide sufficient information from which the Service could assess the employment tax liability against the individual employer. Absent the Schedule R (or some form of equivalent information), the Service cannot ascertain from the aggregate Form 941 whether the agent is merely filing the return to satisfy the agent's employment tax filing requirements (as the agent itself may have employees) or whether the agent is filing the Form 941 to satisfy the employment tax filing obligations of each individual employer for whom the agent is authorized to act. See Rev. Proc. 2013-39, § 4.01 (the agent files one return for each tax-return period to report "the wages and employment taxes on the wages paid to its employees, and the wages and employment taxes on the wages paid by the agent to the employees of each employer for whom the agent is authorized to act."). This is important because the employer remains liable for filing all employment tax returns. Id. at §§ 2.02 and 3.05. Further, absent the Schedule R (or some form of equivalent information), the Service cannot ascertain from the aggregate Form 941 which portion of the wages and employment taxes reported on the return are properly attributable to each individual employer. Id. at § 4.03. This is important because the employers for whom the agent is authorized to act are not liable for the aggregate amount reported on the Form 941 by

the agent, but remain liable for their own portion of the employment taxes.[5]

In sum, the Service could successfully argue that the assessment period of limitations under section 6501 is not triggered with respect to the individual employer under the facts presented in Scenario (2).

3. **Payor Designated to Perform Acts of Employer Files Aggregate Form 941**

In Scenario (3), the Service could potentially argue that the third-party payor's filing of an aggregate Form 941 without the Schedule R is an insufficient filing to commence the period of limitations on assessment against the employer. Like Scenario (2), the third-party payor's filing fails to satisfy the first Beard requirement -- that is, it fails to provide sufficient information to allow the Service to compute the individual employer's employment tax liability.

For the reasons discussed above with respect to Scenario (2), the third-party payor's filing of an aggregate Form 941 does not provide the Service with sufficient information to compute the individual employer's employment tax liability. See Form 2678 Agent Filing Aggregate Form 941 Without Schedule R, supra. Moreover, in Scenario (3), although there is no specific requirement in published guidance or the form instructions for the third-party payor to file a Schedule R, there is also no authorization for the third-party payor to file an aggregate Form 941 under the payor's EIN on behalf of multiple employers in the first instance. Generally, employers are required to file individual employment tax returns and have no authority to file an aggregate return unless they have an approved Form 2678 from the Service. See Rev. Proc. 2013-39 and Instructions for Form 941. Moreover, the Service has even less information with respect to the individual employer than it does under the facts described in Scenario (2), because the Service will not have the Forms 2678 on file to inform the Service that an agent is appointed to perform the acts required of the employer.

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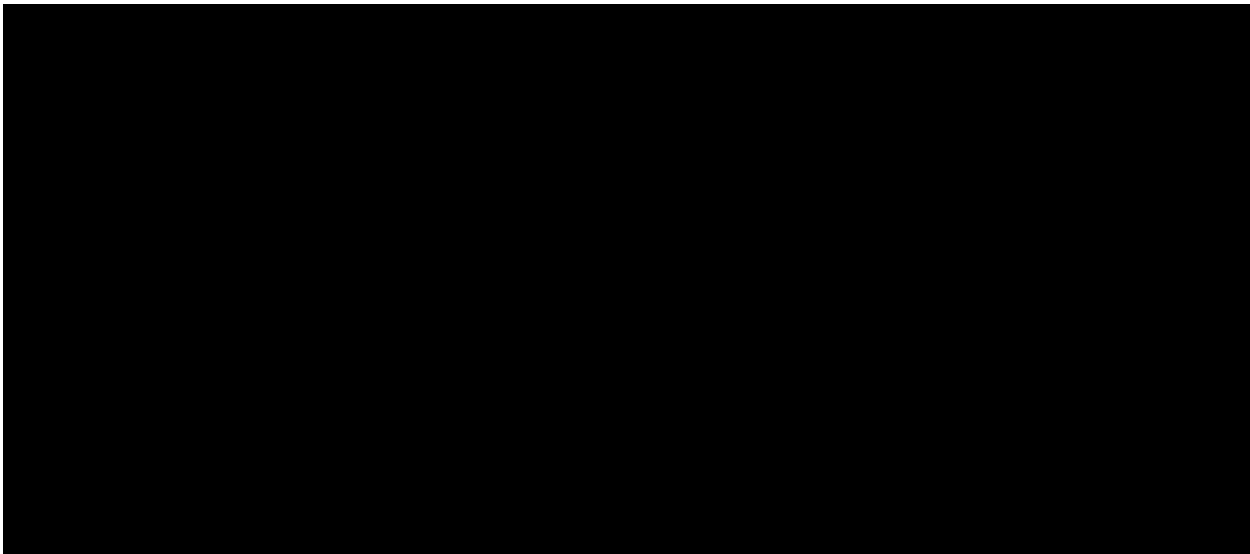
4. **Payor Not Designated to Perform Acts of Employer Files Form 941**

Under the facts described in Scenario (4), the return filed by the third-party payor is an insufficient filing to commence the period of limitations on assessment against the employer. Nothing in the Code or the regulations authorizes the third-party payor to file a return on behalf of the employer, and employment tax obligations cannot be altered by private agreements between an employer and a third-party payor. See Professional Security Services, supra. Moreover, in this scenario, unlike Scenarios (1), (2), and (3), nothing in the Code or regulations makes the third-party payor liable to pay the employment tax, i.e., the third-party payor is not the taxpayer (or a co-taxpayer) because the payor is not the employer , an agent with an approved Form 2678, or a payor designated to perform the acts required of an employer. The facts in Scenario (4) are not materially distinguishable from a situation in which a third-party that is not authorized to act for the taxpayer under the Code or regulations signs the taxpayer's return; in such cases, courts have held that the return signed by an unauthorized person is invalid. See, e.g., Weiner, 255 F. Supp.2d at 647-48 ("the taxpayer must execute the return under penalties of perjury. . . . Weiner's arguments overlook the fourth element of the Beard test. Since Voyer was not a partner, he was not an authorized signatory for the 'taxpayer.'" (emphasis in the original)); *Elliott v. Commissioner*, 113 T.C. 125, 128–29 (1999) (individual income-tax return signed by the taxpayer's attorney did not satisfy the signature requirements of the regulations and thus was not a signed return).[6] Therefore, we do not think the return filed by the third-party payor under the facts presented in Scenario (4) should be considered the employer's return, i.e., the taxpayer's return, for purpose of section 6501.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

[6] Some cases prior to the passage of section 6061 [the 1954 Code] provide that a return signed by someone other than an authorized agent were valid. *See Miller v. Commissioner,* 237 F.2d 830, 837 (5th Cir.1956) (return signed in the taxpayer's name by his wife was valid); *Booher v. Commissioner,* 28 T.C. 817, 824–25 (wife had authority to sign) (1957). As explained in *Elliott*, however, "the holding in Miller [and Booher because Booher relies on Miller] was predicated on the view that there was no specific authorization in the statute [under the 1939 Code] for the Commissioner to specify by regulations what constitutes a return"; "section 6061 [of the 1954 Code] specifically authorizes the Secretary to issue regulations governing the signing of a return." 113 T.C. at 130. However, under the tacit-consent rule, a court may determine that a taxpayer filed a joint return even if the taxpayer did not actually sign the return if the Service seeks to impose liability on the non-signing taxpayer. *See Howell v. Commissioner*, 10 T.C. 859, 866 (1948), *aff'd*, 175 F.2d 240 (6th Cir. 1949). *But see Hennen v. Commissioner*, 35 T.C. 747 (1961) (the tacit-consent rule is only applicable where the Service has made a determination that a joint return was filed in the absence of one spouse's signature; the signing spouse cannot rely on the rule). Further, a taxpayer may be found to have filed a joint return absent the taxpayer's signature if the taxpayer intended to file a joint return with a spouse who did sign the return. *See Estate of Campbell v. Commissioner*, 56 T.C. 1 (1971).



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Please call Jeanne Royal Singley at (202) 317-6798 if you have any further questions.

Sincerely,

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