Office of Chief Counsel
Internal Revenue Service
memorandum

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subject: Treatment of Multiple Filed Returns for the Same Tax Period

This memorandum reflects our views regarding specific issues that you identified with respect to the treatment of multiple filed returns for the same tax period. This advice may not be used or cited as precedent.

Scenario 1:

Taxpayers A and B are a married couple at the end of tax year 2010. On April 3, 2011, Taxpayer A timely files a Form 1040, U.S. Individual Income Tax Return, with a filing status of married filing separately for tax year 2010 and showing a tax liability. Taxpayer B timely files a Form 1040 with a filing status of married filing separately on April 15, 2011. Taxpayers A and B then subsequently file a Form 1040 with a filing status of married filing jointly on July 17, 2013.

Issues Presented:

(1) What is the period of limitations for assessing any tax due for the 2010 taxable year after the filing of the joint return under section 6013(b) and does this period of limitations apply to the abatement of tax previously assessed?

(2) Should the Service accept the joint return filed under section 6013(b) as a valid return if there is nothing to indicate fraud or identity theft?

Conclusions:

(1) The period of limitations for assessing tax due for the 2010 taxable year is the later of (i) three years from the return deemed filing date set forth in section 6013(b)(3)(A), or (ii) one year from the date of the actual filing of the joint return. In this specific scenario,

the period of limitations on assessment expires on July 17, 2014. There is no period of limitations for making any abatements of tax previously assessed for the taxable year.

(2) Yes. The Service should accept the joint return as a valid return as long as the return contains the information required by Beard and the regulations under section 6011.

Analysis:

(1) Period of Limitations on Assessment After Filing of Joint Return

Section 6013(a) allows individuals who are married to file joint returns. Section 7703(a) provides that the determination of whether an individual is married generally is made as of the close of the taxable year. Additionally, married individuals who filed separate returns can later elect to file a joint return replacing the previously filed separate returns if the joint return is filed within the limitations provided by section 6013(b)(2). I.R.C. § 6013(b)(1). This election cannot be made: (A) after three years from the last date prescribed by law for filing the return for such taxable year (determined without regard to any extension of time granted to either spouse); (B) after a notice of deficiency under section 6212 has been mailed to either spouse, with respect to such taxable year, if the spouse, as to such notice, files a petition with the Tax Court within the time prescribed in section 6213; (C) after either spouse has commenced a suit in any court for the recovery of any part of the tax for such taxable year; or (D) after either spouse has entered into a closing agreement under section 7121 with respect to such taxable year, or after any civil or criminal case arising against either spouse with respect to such taxable year has been compromised under section 7122. I.R.C. § 6013(b)(2). Thus, assuming the joint return is filed within these limitations, the return is timely and constitutes the original return of the husband and wife for such taxable year. I.R.C. § 6013(b)(1); Treas. Reg. § 1.6013-2(a)(1).

To be valid, an assessment of tax under section 6201 must be made within the applicable period for assessment under section 6501, which is generally three years after the return was filed.[1] See, e.g., Gentry v. United States, 962 F.2d 555, 557 (6th Cir. 1992); Howell v. United States, 164 F.3d 523, 525-26 (10th Cir. 1998). Section 6013(b)(3) sets forth rules for determining when the joint return under section 6013(b) is deemed to have been filed for purposes of the period of limitations on assessment under section 6501. When both spouses file separate returns before filing a joint return under section 6013(b), the joint return is deemed to have been filed on the date the last separate return was filed (but not earlier than the last date prescribed by law for the filing of such separate return). I.R.C. § 6013(b)(3)(A)(i). When only one spouse was required and did file a separate return prior to filing a joint return under section 6013(b),

[1] Sections 6501 and 6503 provide numerous exceptions to the general three year rule, which we assume, for purposes of this scenario, are not applicable.

the joint return is deemed to have been filed on the date of the filing of the separate return (but not earlier than the last day prescribed by law for the filing of such return. I.R.C. § 6013(b)(3)(A)(ii). When both spouses were required to file a return, but only one spouse did so, the joint return is deemed to have been filed on the date of the filing of the joint return. I.R.C. § 6013(b)(3)(A)(iii). In this scenario, therefore, the joint return for Taxpayers A and B is deemed to have been filed on April 15, 2011 and the normal three year period of limitations on assessment would expire on April 15, 2014.

Section 6013(b)(4), however, states that if a joint return is made under section 6013(b), the time allowed to the Service for assessment is a minimum of one year after the actual filing of the joint return (without regard to the rules provided in section 6013(b)(3)(A)). See also Treas. Reg. § 1.6013-2(d). Accordingly, in this scenario the period of limitations for assessment of tax due is extended to July 17, 2014, which is one year from the date the joint return is filed.

Any abatements of previous assessments made by the Service during the initial processing and handling of the married filing separate returns filed prior to the joint return, however, are not subject to a period of limitations. Section 6404(a)(1) allows the Service to abate the unpaid portion of assessments that are excessive in amount. In general, an abatement "wipes out the assessment" and if the Service decides to reimpose an abated assessment, it must make the new assessment within the statutory limitations period. Neither section 6404 nor the regulations contains a period of limitations on the abatement of a tax. Thus, as long as initial assessments are made within the proper period of limitations, nothing in section 6404 or the regulations prevents the Service from exercising its abatement authority after the assessment period of limitations has expired. On the other hand, the Service cannot reassess an abated liability unless it does so within the applicable period of limitations.

(2) Acceptance of Joint Return

Treasury Regulation § 1.6011-1(b) provides, in relevant part, that each taxpayer should set forth fully and clearly the information required to be included on the return. A valid return is a document that: (1) purports to be a return; (2) is executed under penalties of perjury; (3) reports sufficient data to calculate the tax liability; and (4) constitutes an honest and reasonable attempt to satisfy the requirements of law. Beard v. Commissioner, 82 T.C. 766, aff'd, 793 F.2d 139 (6th Cir. 1986).

If there are no facts to indicate fraud or identity theft, the Service must accept the joint return filed under section 6013(b) as a valid return as long as the joint return contains the information required by Beard and the regulations under section 6011.

Scenario 2:

On April 15, 2011, a Form 1040 with a filing status of married filing jointly is timely filed for tax year 2010 on behalf of Taxpayers C and D, a married couple. The joint Form 1040 reports income for both Taxpayers C and D as well as income tax prepayment

credits for withholding for both Taxpayers C and D. Upon receipt, the Service issues a refund check to Taxpayers C and D to the address on the joint return, which is negotiated solely by Taxpayer C.

On June 20, 2011, a date after the due date for the joint return, Taxpayer D files a separate Form 1040 for tax year 2010.[2] The Service contacts Taxpayer D to determine which return is correct, and Taxpayer D replies that she never signed the joint return and it was filed without her knowledge or permission. Because the joint return included income and withholding credits from both Taxpayers C and D, the Service makes adjustments to reflect the proper amount of income, withholding credits, and tax liability, as well as the proper filing status, for each of the taxpayers.

Issues Presented:

(1) Is the refund check issued by the Service to Taxpayers C and D with respect to the joint return and negotiated by Taxpayer C an erroneous refund subject to section 7405?

(2) Whether the administrative adjusting of overstated withholding credits is an assessment subject to deficiency procedures?

(3) What is the period of limitations by which the Service must assess any tax liabilities against Taxpayers C and D?

(4) Does an invalid joint election automatically make the return to which the election relates a false or fraudulent return under section 6501(c)(1), thereby authorizing the Service to make any additional assessments at any time?

Conclusions:

(1) No. A refund check issued by the Service to Taxpayers C and D with respect to the joint return and negotiated by Taxpayer C is not an erroneous refund subject to section 7405.

(2) The administrative adjusting of overstated withholding credits is immediately assessable as a tax under section 6201(a)(3) without the use of deficiency procedures.

(3) Absent proof that Taxpayer C filed the joint return with an intent to evade tax (or that any of the other exceptions in section 6501 apply), the period of limitations for assessing the overstated credits as well as any other tax liabilities against Taxpayer C is three years from the filing of the joint return. Taxpayer C's return is still a valid return; it is only the joint election that is invalid. For Taxpayer D, the period of limitations on assessment is three years from the filing of the separate return if Taxpayer D did not intend to file a joint return.

[2] For the purposes of the hypothetical, it is immaterial whether Taxpayer D's Form 1040 is filed with a status of single, head of household, or married filing separately.

(4) An invalid joint election does not automatically make a return false or fraudulent under section 6051(c)(1). The Service must be able to show that Taxpayers C or D underpaid tax and filed the joint return with the specific intent to evade a tax believed to be owed from the facts and circumstances.

Analysis:

(1) Erroneous Refund

Generally, an erroneous refund is defined expansively as the receipt of money from the Service to which the recipient is not entitled. See I.R.C. § 7405; IRM 21.4.5.1(2). Not all refunds made by the Service for tax periods later requiring adjustments, however, are "erroneous refunds." For a refund to be "erroneous" with respect to section 7405, the Service must have made some type of mistake, either a mistake of law or fact, or a clerical or ministerial error. Refunds based on a taxpayer's self-assessment on a submitted return may be incorrect if the taxpayer who submitted the return was mistaken in the self-assessment or intentionally misleading, but such refunds are not "erroneous refunds" in terms of section 7405 because the mistake or error does not lie with the Service. To deem all refunds made by the Service with respect to returns later determined to have an incorrect tax liability as "erroneous refunds" would prove too much. Such an overbroad interpretation would allow the Service to file suit pursuant to section 7405 against any taxpayer who received refunds and were later found to have an incorrect tax liability. See, e.g., Greer v. Commissioner, 557 F.3d 688, 692 (6th Cir. 2009) (holding that a court ordered refund, regardless of the underlying merit of the order, is not an "erroneous refund" because the Service made no mistake or clerical error).

The refund described in this scenario is not an "erroneous refund" for purposes of section 7405. The Service initially issued the refund to Taxpayers C and D based on the self-assessed joint return purportedly filed on behalf of both Taxpayer C and D. In doing so, the Service made no mistake, whether as a matter of law or fact or of a clerical or ministerial nature. Only upon receipt of Taxpayer D's separate return did the Service ascertain that the refund was based on Taxpayer C's improper calculation of income, withholding credits, and filing status.

Accordingly, the refund issued by the Service to Taxpayers C and D with respect to the originally filed joint return but negotiated solely by Taxpayer C is not an erroneous refund subject to section 7405.

(2) Assessment of Withholding Credits

The assessment authority contained in section 6201(a) includes the following language regarding the assessment of overstatements of income tax prepayment credits:

> (a) AUTHORITY OF SECRETARY. – The Secretary is authorized and

> required to make the inquiries, determinations, and assessments of all taxes (including. . . additional amounts. . .) imposed by this title. . . . Such authority shall extend to and include the following:
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> * * *
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> (3) ERRONEOUS INCOME TAX PREPAYMENT CREDITS. – If on any return or claim for refund of income taxes under subtitle A there is an *overstatement of the credit for income tax withheld at the source*, or of the amount paid as estimated income tax, the amount so overstated which is allowed against the tax shown on the return of which is allowed as a credit or refund may be assessed by the Secretary in the same manner as in the case of mathematical or clerical error appearing upon the return, except that the provisions of section 6213(b)(2) (relating to abatement of mathematical or clerical error assessments) shall not apply with regard to any assessment under this paragraph.

Section 6201(a) (emphasis added); see also Treas. Reg. § 301.6201-1(a). The Service is authorized under section 6201(a) to assess only taxes imposed by the Code. This is reinforced by section 6203, which provides that the assessment shall be made by recording the taxpayer's liability in the office of the Secretary. Also, section 6303 provides that after an assessment is made pursuant to section 6203, the Secretary shall give notice to each person liable for the unpaid tax, stating the amount and demanding payment thereof. By extending the assessment authority to the overstatement of withholding credits in section 6201(a)(3), Congress intended to treat such amounts as taxes. See infra S. Rep. No. 1622, 83d Cong., 2d Sess., at page 572 (1954); H. Rep. No. 1337, 83d Cong., 2d Sess., at page A404 (1954).

Although the overstatement of withholding credits is assessable as a tax under section 6201(a)(3), unlike most other taxes, the amount is immediately assessable and not subject to deficiency procedures. The definition of "deficiency" provided by section 6211 explicitly does not consider the payment of estimated taxes or withholding of taxes in the calculation. Section 6211(b)(1) provides in part that "the tax imposed by subtitle A and the tax shown on the return shall both be determined without regard to payment on account of estimated tax, without regard to the credit under section 31. . . ." Amounts withheld from wages are credits under section 31 and estimated taxes are credits under section 6315. Moreover, section 6201(a)(3) provides that an overstatement of a credit is assessable in the same manner as in the case of a mathematical or clerical error appearing on the return, which is generally precluded from deficiency procedures under section 6213(b)(1).

Accordingly, the Service can make a summary assessment of the overstated withholding credits against Taxpayer C using the procedures provided in section 6201(a)(3) without the use of deficiency procedures. Any other assessments of tax liability against Taxpayers C and D resulting from the adjustments, however, generally would be subject to deficiency procedures.

(3) Period of Limitations for Assessing Tax Against Taxpayers C and D

Treasury Regulation § 1.6013-1(a)(1) does not authorize a husband and wife to change from a joint return to a separate return, unless prior to the due date of the return (without regard to any extension of time to file) either spouse subsequently files a separate return. Thus, a subsequent separate return filed after the due date generally should be disallowed and not accepted as an original return for purposes of the period of limitations under section 6501. The one exception that allows joint filers to file separate returns after the due date of the return is when the joint election is invalid. See IRM 21.6.1.4.7.

In general, when two taxpayers who are not entitled to joint filing status file a joint return, the return with the invalid joint election is still usually considered valid for period of limitations purposes if all of the elements under Beard are met. In this scenario, the Service must look to the intent of the nonsigning spouse to determine whether the joint return is a valid return for purposes of starting the period of limitations on assessment. See Olpin v. Commissioner, 270 F.3d 1297, 1301 (10th Cir. 2001) (indicating that if one spouse on a joint return signs, there needs to be an inquiry as to the intent of the other spouse). If the Service determines that the joint return for Taxpayer D was invalid based upon all the facts and circumstances (because Taxpayer D actually did not sign the joint return and did not intend to file a joint return), then the assessment period of limitations for Taxpayer D in this example would begin to run from the date of the filing of the separate return on June 20, 2011. Otherwise, the assessment period of limitations for Taxpayer D would begin to run from the date of the filing of the joint return.

With respect to Taxpayer C, the Service needs to make any assessments of tax liability within three years of the filing of the original return on April 15, 2011, unless one of the enumerated exceptions in section 6501 specifically applies.[3] The same period of assessment applies to the assessment of any overstated credits because, for the reasons stated above in (2), an assessment under section 6201(a)(3) is of a tax imposed by that section in the amount of the overstatement of income tax prepayment credit claimed by the taxpayer on an income tax return (or claim for refund or credit).

(4) Fraud for Invalid Joint Election

In the case of a false or fraudulent return with the intend to evade tax, the tax may be assessed, or a proceeding in court for collection of the tax may be begun without assessment, at any time after the false or fraudulent return is filed. I.R.C. § 6501(c)(1). The determination of fraud for purposes of the period of limitations on assessment under section 6501(c)(1) is the same as the determination of fraud for purposes of the civil penalty under section 6663. Neely v. Commissioner, 116 T.C. 79, 85 (2001); see Rhone-Poulenc Surfactants and Specialities, LP v. Commissioner, 114 T.C. 533, 548

[3] This assumes that the joint return still constitutes a valid return under Beard with respect to Taxpayer C.

(2000); Murphy v. Commissioner, T.C. Memo. 1995-76 (citing Asphalt Industries, Inc. v. Commissioner, 384 F.2d 229, 232 (3d Cir. 1976), rev'g 46 T.C. 622 (1966).

Neither the Internal Revenue Code nor the Treasury Regulations provide a definition of "fraud", however, case law has defined "fraud" as an intentional wrongdoing designed to evade tax believed to be owing. Neely, 116 T.C. at 85 (citing Edelson v. Commissioner, 829 F.2d 828, 833 (9th Cir. 1987); see also McGee v. Commissioner, 61 T.C. 249, 256, aff'd, 519 F.2d 1121 (5th Cir. 1975). The Service bears the burden of proving fraud and must establish it by clear and convincing evidence. See I.R.C. § 7454(a); Tax Court Rule 142(b). To satisfy the burden of proof, the Service must show that: (1) an underpayment in tax exists, and (2) the taxpayer intended to conceal, mislead, or otherwise prevent the collection of taxes. Neely, 116 T.C. at 85. See Chin v. Commissioner, T.C. Memo. 1994-54; Parks v. Commissioner, 94 T.C. 654, 660-61.

The courts have relief upon a number of "badges of fraud" in determining the existence of fraud. While no single factor is necessarily sufficient to establish fraud, the existence of several "badges" is persuasive circumstantial evidence of fraud. See Bacon v. Commissioner, T.C. Memo. 2000-257; Kaissy v. Commissioner, T.C. Memo. 1995-474. Some common "badges of fraud" are: (1) understatement of income; (2) inadequate records; (3) failure to file tax returns; (4) implausible or inconsistent explanations of behavior; (5) concealing assets; and (6) failure to cooperate with tax authorities. See Bradford v. Commissioner, 796 F.2d 303, 307 (9th Cir. 1986).

There is no automatic finding of fraud. To sustain a finding a fraud, the Service must prove that the taxpayer intended to conceal, mislead or otherwise prevent the collection of taxes. An invalid joint election could be made mistakenly without the necessary intent to evade the collection of taxes and, therefore, the return to which the joint election related would not automatically be considered a false or fraudulent return.[4] Thus, the Service must be able to show that Taxpayers C or D underpaid tax and filed the joint return with the specific intent to evade a tax believed to be owed to deem the joint return as a false or fraudulent return.

[4] The same conclusion would be true with respect to other similar errors, including an incorrect social security number on a tax return.