



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

SMALL BUSINESS/SELF-EMPLOYED DIVISION

March 9, 2004

Ref: 11-2004-00241

Dear Mr. _____,

We are in receipt of your letter dated December 3, 2003 addressed to the Freedom of Information Act Reading Room in Washington, DC and received in our office on March 2, 2004.

You are requesting copies of any existing documents that would indicate what the Internal Revenue Service's procedure is in transforming a "Tax Class 5" (IRS Document 8209) information file to a "Tax Class 2" information file.

Please be advised that Tax Class 5 pertains to Information Returns Processing (IRP) and Estate and Gift tax while Tax Class 2 pertains to Individual or Fiduciary Income Tax and Partnership return.

Based upon your description of the document requested we have no record responsive to your request.

As this completes our response we are closing our file on this matter. For further information, you may call me at (718) 488-2511 or write to me at the Internal Revenue Service, 625 Fulton Street - Suite 611, Brooklyn, NY 11201.

Sincerely,

A handwritten signature in black ink that reads "Mildred Martinez-Galloway".

Mildred Martinez-Galloway

Disclosure Officer

ID No. 11-03499

Department
of the
Treasury

Internal
Revenue
Service

Office of
Chief Counsel

Notice

[CC-2004-009]

January 22, 2004

Service's Litigating Position for
Returns Prepared under Section

Upon incorporation

Subject: 6020(b)

Cancel Date: into CCDM

Purpose

This Notice announces the Service's litigating position with respect to a recent change in the Service's practices in preparing substitute income tax returns under section 6020(b). Because the new procedures satisfy the requirements of section 6020(b), this office will defend the section 6651(a)(2) addition to tax for failure to pay the amount reported on a return in cases that follow the new procedure. This Notice updates and modifies CC-2003-019 (June 12, 2003).

Background

Section 6651(g) provides that a "return" the Secretary prepares under section 6020(b) functions as a return filed by the taxpayer for purposes of determining the failure to pay addition to tax under section 6651(a)(2). In several opinions issued last year, the United States Tax Court held that the Service had not prepared returns under section 6020(b) that would allow it to determine the failure to pay addition to tax under section 6651(a)(2) against a nonfiler. See Cabirac v. Commissioner, 120 T.C. 163 (2003), appeal docketed, No. 03-3157 (3rd Cir. July 21, 2003), Spurlock v. Commissioner, T.C. Memo. 2003-124, and Rhodes v. Commissioner, T.C. Memo 2003-133. Based on these adverse opinions, CC-2003-019 directed Counsel attorneys to concede the section 6651(a)(2) addition where the Service did not process as a return documents that 1) identify the taxpayer; 2) provide a basis for the taxpayer's tax computation; and 3) are signed by a Service employee delegated the authority to sign section 6020(b) returns. Further, CC-2003-019 instructed Chief Counsel attorneys to seek an increase in the section 6651(a)(1) addition to tax when conceding the section 6651(a)(2) addition to tax.

Change in the Service's Practices

As set forth in I.R.M. 20.1.2.1.4(9), the Service recently began attaching a completed Form 13496, IRC Section 6020(b) Certification, to other documents which, together, satisfy each of the elements of a section 6020(b) return. The package of documents consist of the Form 13496, a copy of the Form 1040 used to establish the taxpayer's

account on the master file or a transcript of account, a Form 4549, Income Tax Examination Changes, and a Form 886-A, Explanation of Items. A copy of Form 13496 is attached to this Notice.

In Spurlock, the Tax Court held that a return for section 6020(b) purposes must be "subscribed, it must contain sufficient information from which to compute the taxpayer's tax liability, and the return form and any attachments must purport to be a 'return'." Spurlock, slip. op. at 27. The package of documents to which the Service employee attaches the Form 13496 meets the first element of this test because a Service employee with authority to sign a section 6020(b) return subscribes the form.¹ The package meets the second element of this test because Form 4549, Income Tax Examination Changes, and Form 886-A, Explanation of Items, contain information explaining how the Service computed the taxpayer's tax liability. The package meets the third element of the test because Form 13496 is an express certification that the documents constitute a valid return under section 6020(b) and states the Service's intent to treat the documents as the return filed by the taxpayer for purposes of determining the amount of the additions to tax under section 6651(a)(2).

In addition, by including in the package the Form 1040 that the Service used to establish the taxpayer's account on its computer system, the package includes virtually the same documents that the Tax Court found to be a return made under section 6020(b) in Millsap v. Commissioner, 91 T.C. 926, 928 (1988), namely a dummy return containing a taxpayer's name, address and social security number stapled to a signed revenue agent's report containing an explanation of the taxpayer's income, exemptions, deductions, and filing status. Using the transcript of account as an alternative to the dummy Form 1040 is an option to address those circumstances where the Service no longer uses a dummy form to establish a taxpayer's account on its computer systems, but uses electronic data to open the account. Because the Form 13496 package meets the elements Spurlock specifies, and the documents are the same as, or parallel to, the documents at issue in Millsap, the Form 13496 package should constitute a return under section 6020(b).

¹ See Hartman v. Commissioner, 65 T.C. 542, 545, 546 (1975), holding that section 6020(b)(2) requires that the return be subscribed, but need not be signed under oath. Section 7701(a)(11) defined the Secretary as the Secretary of the Treasury or his delegate. A delegate includes any officer, employee or agency of the Department of the Treasury authorized by the Secretary of the Treasury to perform functions described in the context. I.R.C. § 7701(a)(12)(A)(i). The Regulations under section 6020(b) provide that such a return may be executed by the district director or other authorized internal revenue officer or employee. Treas. Reg. § 301.6020-1(b)(1). Delegation Order Number 182 extends the authority to execute a section 6020(b) return to revenue agents, tax auditors, revenue officers, collection support function managers, Service Center Collection Branch managers and tax resolution representatives who are at least at the GS-9 level; to Customer Service Collection Branch managers, GS-10 and above; and to Automated Collection Branch Unit Managers, GS-11 and above. See IRM 1.2.2.5.2. See also IRM 5.18.2.2(2) and 5.18.2.4.28(2).

Accordingly, this office will no longer concede the section 6651(a)(2) addition to tax in cases where it can introduce the Form 13496 package into evidence. If the Service has not prepared a Form 13496 package, this office will continue to follow the direction set forth in CC-2003-019 and will defend a document as constituting a section 6020(b) return only where it otherwise meets the criteria set forth in Tax Court opinions and the defense is coordinated with Branch 2, Administrative Provisions and Judicial Practice Division.

The current Automated Substitute for Return ("ASFR") procedures do not alone create a section 6020(b) return, but the Service is presently considering changes to those procedures to create a section 6020(b) return.

Finally, while CC-2003-019 directs Counsel attorneys to seek an increase in the section 6651(a)(1) addition to tax when they concede the section 6651(a)(2) penalty, pleading the increase is not required in all S cases. If the Tax Court rules do not require an answer, Counsel attorneys, with the concurrence of their managers, may choose to forgo seeking an increase to the section 6651(a)(1) addition to tax, if the amount of increase is sufficiently small. Instead, in the exercise of their discretion, Counsel may concede the section 6651(a)(2) penalty by informing the petitioner and the Tax Court of the concession.

For further guidance, please contact Branch 2, Administrative Provisions and Judicial Practice Division at 202-622-4940.

/s/

DEBORAH A. BUTLER
Associate Chief Counsel
(Procedure & Administration)

Attachment:
Form 13496

IRC Section 6020(b) Certification	Total pages certified as valid section 6020(b) return	Tax year
	Name of taxpayer	
Social security number		
Address of taxpayer (Number, Street, City or Town, State, ZIP code)		

Certification

The officer of the IRS identified below, authorized by Delegation Order 182, certifies the attached pages constitute a valid return under section 6020(b). This return consists of the following items:

1. A copy of the Form 1040 which the IRS used to establish the taxpayer's account on its computer system or, alternatively, a transcript of a account reflecting the entry of data used to establish the taxpayer's account on the IRS computer system;
2. Form 4549, Income Tax Examination Changes;
3. Form 886-A, Explanation of Items; and
4. This certification (Form 13496).

Pursuant to section 6651(g)(2), this certification, with attachments, shall be treated as the return filed by the taxpayer for purposes of determining the amount of the additions to tax under paragraphs (2) and (3) of section 6651(a).

IRS Authorization Data

Employee name	Title	Office	ID number
Signature			Date (mm/dd/yyyy)

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