

Internal Revenue Service
memorandum

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SCA 1998-053
UILC 6011.00-00
6065.03-00

date: July 29, 1998

to: District Counsel, Houston
Attn: Christina Moss

from: Assistant Chief Counsel (Income Tax & Accounting)

subject: Disclaimer Returns
Significant Service Center Advice

This responds to your request for Significant Service Center Advice dated February 13, 1998, in connection with a question posed by the Austin Service Center.

Disclosure Statement

Unless specifically marked "Acknowledged Significant Advice, May Be Disseminated" above, this memorandum is not to be circulated or disseminated except as provided in CCDM (35)2(13)3:(4)(d) and (35)2(13)4:(1)(e). This document may contain confidential information subject to the attorney-client and deliberative process privileges. Therefore, this document shall not be disclosed beyond the office or individual(s) who originated the question discussed herein and are working the matter with the requisite "need to know." In no event shall it be disclosed to taxpayers or their representatives.

ISSUE

Whether a complete Form 1040 with an attachment to an otherwise effective penalties of perjury statement¹ (hereafter "addition") is a valid return for federal tax purposes.

CONCLUSION

A complete Form 1040 with an addition that denies tax liability is not a valid return because the addition negates the penalties of perjury statement. However, if the addition does

¹ The use of the phrase otherwise effective penalties of perjury statement means the taxpayer signed the statement and did not make a change to it.

not negate the statement, but merely makes a protest against taxes or other matters, the form is a valid return for federal tax purposes.

FACTS

A service center receives complete Forms 1040 with additions in which taxpayers protest the payment of taxes. Taxpayers usually call attention to the addition by (1) writing an asterisk on the return, either next to line 53 (total tax amount) or line 64 (the tax amount owed) and (2) inserting on the second page of the return by lines 61-64 or on the bottom of the second page the following text: "The admitted liability is zero. See Attached Disclaimer Statement."

In the examples you provided, all the additions state that the taxpayer denies liability for the tax shown on the Form 1040. In some cases, the taxpayer also includes \$1,000 with the Form 1040 and states in the addition the following: "payment in the amount of \$1,000 as a voluntary contribution."

The service center has experienced some uncertainty in its disposition of these sorts of forms. Because of this and the potential for inconsistent treatment and processing of these forms, you requested this significant service center advice.

DISCUSSION

Section 6001 of the Internal Revenue Code requires every person liable for tax to make a return and comply with the rules and regulations issued by the Internal Revenue Service.

Section 6011 of the Code requires every person liable for tax imposed by title 26 to make a return according to the forms and regulations prescribed by the Service.

Section 6065 of the Code and §1.6065-1(a) of the Income Tax Regulations require any return made under any provision of the internal revenue laws or regulations to contain or be verified by a written declaration that it is made under penalties of perjury.

If a taxpayer fails to comply with section 6065 by submitting a return without the executed penalties of perjury statement, that return is a nullity. Lucas v. Pilliod Lumber Co., 281 U.S. 245 (1930). For example, in Hettig v. U.S., 845 F.2d 794 (8th Cir. 1988), the court found that the taxpayer's return was a nullity because striking the words "under penalties of perjury" negated the penalties of perjury statement.

A taxpayer can also negate the penalties of perjury statement with an addition. In Schmitt v. U.S., 140 B.R. 571 (Bank W.D. Okl. 1992), the taxpayers filed a return with the following statement at the end of the penalties of perjury statement, "SIGNED UNDER DURESS, SEE STATEMENT ATTACHED." In the addition, the taxpayers denied liability for tax on wages. The Service argued that the statement, added to the "return", qualified the penalties of perjury statement, thus making the penalties of perjury statement ineffective and the return a nullity. Id. at 572.

In agreeing with the Service, the court pointed out that the voluntary nature of our tax system requires the Service to rely on a taxpayer's self-assessment and on a taxpayer's assurance that the figures supplied are true to the best of his or her knowledge. Id. Accordingly, the penalties of perjury statement has important significance in our tax system. The statement connects the taxpayer's attestation of tax liability (by the signing of the statement) with the Service's statutory ability to summarily assess the tax.

Similarly, in Sloan v. Comm'r, 53 F.3d 799 (7th Cir. 1995), cert. denied, 516 U.S. 897 (1995), the taxpayers submitted a return containing the words "Denial & Disclaimer attached as part of this form" above their signatures. In the addition, the taxpayers denied liability for any individual income tax. In determining the effect of the addition on the penalties of perjury statement, the court reasoned that it is a close question whether the addition negates the penalties of perjury statement or not. The addition, according to the court, could be read just to mean that the taxpayers reserve their right to renew their constitutional challenge to the federal income tax law. However, the court concluded that the addition negated the penalties of perjury statement. Id. at 800.

In both Schmitt and Sloan the court questioned the purpose of the addition. Both courts found that the addition of qualifying language was intended to deny tax liability.

Accordingly, this effect rendered the purported returns invalid.²

On the other hand, courts have acknowledged that taxpayers may make additions to the return to exercise their first amendment rights without negating the penalties of perjury statement. For example, in McCormick v. Comm'r, 94-1 U.S.T.C. ¶ 50,026 (E.D.N.Y. 1993), the taxpayer timely filed a complete return and signed it under penalties of perjury. Immediately below the penalties of perjury statement, the taxpayer added the statement "under protest." The Service did not treat the return as a valid return. The court found in favor of the taxpayer finding that the taxpayer was lodging a protest rather than denying tax liability. See also, Todd v. U.S., 849 F.2d 365 (9th Cir. 1988).

These cases highlight the tension between a taxpayer's exercise of first amendment constitutional rights and a taxpayer's statutory obligation to file a tax return under penalties of perjury. If by making the addition the taxpayer both exercises a constitutionally protected right (to protest) and negates the penalties of perjury statement, courts have held that the statutory duty to file a tax return outweighs the small infringement, if any, on a taxpayer's first amendment right to protest. See Sloan, 53 F.3d at 800; Hettig, 845 F.2d at 795-96.

You submitted several redacted Forms 1040 with additions for our consideration. To determine whether an addition to a Form 1040 denies tax liability, the courts analyze the purpose of the addition. In each of the Forms 1040 you submitted for our review, the addition explicitly denies the tax liability set forth on the related return. These additions, therefore, negate the penalties of perjury statements and the Forms 1040 fail to constitute valid returns for federal tax purposes.

When the service center receives a Form 1040 with an addition, we suggest the service center process the form as follows: Upon receipt of the form, the Code and Editing Function

² Note, however, that in Penn Mutual Indem. Co. v. Comm'r, 32 T.C. 653 (1959), aff'd 277 F.2d 16 (3d Cir. 1960), the taxpayer filed an otherwise facially complete return showing a tax due. The taxpayer attached a letter to the return denying that it owed the tax, claiming the applicable taxing statute as unconstitutional. The court concluded that the taxpayer had filed a valid return. Thus, the court appeared to cast the return as a "no tax" return, meaning the reported tax liability is actually zero, rather than as a nullity. See id. at 668 (Murdock, J., concurring).

at the service center should promptly send the form to the Examination Function. If the Examination Function determines that a taxpayer's addition denies tax liability (and, therefore, negates an otherwise effective penalties of perjury statement), the form is not a valid return, and penalties, such as the failure to file penalty, and interest would apply. The Examination Function should contact District Counsel regarding the disposition of forms containing ambiguous or doubtful additions.

Moreover, if the return is not a valid return, the Service should issue a statutory notice of deficiency for any taxes due (including any amount determined by the taxpayer). This practice will protect the statute of limitations on assessment if a court subsequently decides that the form is a valid return.

We trust this advice addresses your concerns satisfactorily. If you have any questions, please contact Ms. Renay France, an attorney of my staff, on 202-622-4940.

By _____/s/_____
Rochelle L. Hodes
Senior Technician Reviewer
Branch 4

cc: Assistant Regional Counsel (TL), Midstates Region
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