

Internal Revenue Service
memorandum

JAN 11 1969

5240

date: December 23, 1988
 to: All Districts
 Serviced by Ogden Service Center
 from: Director C:4000
 Ogden Service Center

RECEIVED SACTO DIS. DIR.		
DATE: 1-9-89		
DIST.	RESP.	INFO.
DD		
ADD		✓
PRO		
EEO		
PAO		
DPSS		
RM		
C		✓
E		✓
CI		✓
TS		
QC		
Cys Sent:		

subject: Substitute for Return (SFR) Cases - Joint Filing Issue

The Service's policy to not allow a joint filing election more than 3 years from the original date of the return if either an SFR assessment has been made, or a 90-day letter proposing assessment has been issued, continues to generate concern from the district offices. While we share the concerns, we are following the established policy and will continue to do so until there is a change.

Attached for your information is a briefing paper we sent to the Regional Commissioner, Southwest Region, expressing our reservations about this policy. This information has also been forwarded to the National Office. We have been informed the National Office is reconsidering this position. There are indicators that a change may be made to this policy; however, in the interim we are obligated to continue the practice of disallowing the election of joint filing status under the above conditions.

We would appreciate it if you would communicate this information to your staff.

Bob Wenzel
 Director

Attachment

cc: ARC(Coll)SWR, MWR, WR
 ARC(Exam)SWR, MWR, WR
 ARC(CI)SWR, MWR, WR

TR

FIELD BRANCH III 1/17/89

	RESP	ACTN	COR	INFO
3100				✓
3200				✓
3300				✓
3400				✓
3500				✓
3600				✓
FB III	✓			
FILE				

COLLECTION DIVISION

	RESP	ACTION	COR	INFO
CHIEF, FB I				✓
CHIEF, FB II				✓
CHIEF, FB III				✓
CHIEF, FB IV				✓
CHIEF, FB V				✓
CHIEF, FB VI				✓
CHIEF, FB VII				✓
CHIEF, FB VIII				✓
CHIEF, FB IX				✓
CHIEF, FB X				✓
CHIEF, FB XI				✓
CHIEF, FB XII				✓
CHIEF, FB XIII				✓
CHIEF, FB XIV				✓
CHIEF, FB XV				✓
CHIEF, FB XVI				✓
CHIEF, FB XVII				✓
CHIEF, FB XVIII				✓
CHIEF, FB XIX				✓
CHIEF, FB XX				✓
CHIEF, FB XXI				✓
CHIEF, FB XXII				✓
CHIEF, FB XXIII				✓
CHIEF, FB XXIV				✓
CHIEF, FB XXV				✓
CHIEF, FB XXVI				✓
CHIEF, FB XXVII				✓
CHIEF, FB XXVIII				✓
CHIEF, FB XXIX				✓
CHIEF, FB XXX				✓
CHIEF, FB XXXI				✓
CHIEF, FB XXXII				✓
CHIEF, FB XXXIII				✓
CHIEF, FB XXXIV				✓
CHIEF, FB XXXV				✓
CHIEF, FB XXXVI				✓
CHIEF, FB XXXVII				✓
CHIEF, FB XXXVIII				✓
CHIEF, FB XXXIX				✓
CHIEF, FB XL				✓
CHIEF, FB XLI				✓
CHIEF, FB XLII				✓
CHIEF, FB XLIII				✓
CHIEF, FB XLIV				✓
CHIEF, FB XLV				✓
CHIEF, FB XLVI				✓
CHIEF, FB XLVII				✓
CHIEF, FB XLVIII				✓
CHIEF, FB XLIX				✓
CHIEF, FB L				✓
CHIEF, FB LI				✓
CHIEF, FB LII				✓
CHIEF, FB LIII				✓
CHIEF, FB LIV				✓
CHIEF, FB LV				✓
CHIEF, FB LVI				✓
CHIEF, FB LVII				✓
CHIEF, FB LVIII				✓
CHIEF, FB LIX				✓
CHIEF, FB LX				✓
CHIEF, FB LXI				✓
CHIEF, FB LXII				✓
CHIEF, FB LXIII				✓
CHIEF, FB LXIV				✓
CHIEF, FB LXV				✓
CHIEF, FB LXVI				✓
CHIEF, FB LXVII				✓
CHIEF, FB LXVIII				✓
CHIEF, FB LXIX				✓
CHIEF, FB LXX				✓
CHIEF, FB LXXI				✓
CHIEF, FB LXXII				✓
CHIEF, FB LXXIII				✓
CHIEF, FB LXXIV				✓
CHIEF, FB LXXV				✓
CHIEF, FB LXXVI				✓
CHIEF, FB LXXVII				✓
CHIEF, FB LXXVIII				✓
CHIEF, FB LXXIX				✓
CHIEF, FB LXXX				✓
CHIEF, FB LXXXI				✓
CHIEF, FB LXXXII				✓
CHIEF, FB LXXXIII				✓
CHIEF, FB LXXXIV				✓
CHIEF, FB LXXXV				✓
CHIEF, FB LXXXVI				✓
CHIEF, FB LXXXVII				✓
CHIEF, FB LXXXVIII				✓
CHIEF, FB LXXXIX				✓
CHIEF, FB LXXXX				✓
CHIEF, FB LXXXXI				✓
CHIEF, FB LXXXXII				✓
CHIEF, FB LXXXXIII				✓
CHIEF, FB LXXXXIV				✓
CHIEF, FB LXXXXV				✓
CHIEF, FB LXXXXVI				✓
CHIEF, FB LXXXXVII				✓
CHIEF, FB LXXXXVIII				✓
CHIEF, FB LXXXXIX				✓
CHIEF, FB LXXXXX				✓
CHIEF, FB LXXXXXI				✓
CHIEF, FB LXXXXXII				✓
CHIEF, FB LXXXXXIII				✓
CHIEF, FB LXXXXXIV				✓
CHIEF, FB LXXXXXV				✓
CHIEF, FB LXXXXXVI				✓
CHIEF, FB LXXXXXVII				✓
CHIEF, FB LXXXXXVIII				✓
CHIEF, FB LXXXXXIX				✓
CHIEF, FB LXXXXXX				✓
CHIEF, FB LXXXXXXI				✓
CHIEF, FB LXXXXXXII				✓
CHIEF, FB LXXXXXXIII				✓
CHIEF, FB LXXXXXXIV				✓
CHIEF, FB LXXXXXXV				✓
CHIEF, FB LXXXXXXVI				✓
CHIEF, FB LXXXXXXVII				✓
CHIEF, FB LXXXXXXVIII				✓
CHIEF, FB LXXXXXXIX				✓
CHIEF, FB LXXXXXXX				✓
CHIEF, FB LXXXXXXXI				✓
CHIEF, FB LXXXXXXXII				✓
CHIEF, FB LXXXXXXXIII				✓
CHIEF, FB LXXXXXXXIV				✓
CHIEF, FB LXXXXXXXV				✓
CHIEF, FB LXXXXXXXVI				✓
CHIEF, FB LXXXXXXXVII				✓
CHIEF, FB LXXXXXXXVIII				✓
CHIEF, FB LXXXXXXXIX				✓
CHIEF, FB LXXXXXXX				✓

December 2, 1988

Regional Commissioner
Southwest Region

Director C:4000
Ogden Service Center

Substitute for Return (SFR) - Joint Filing (IRC 6013)

This memorandum is intended to provide you with information about a concern that we have in the SFR area. This concern has been discussed with Jim Kopidlansky and Jack Miller by Tim Towns of my staff. Kopl has stated that he will pursue this matter with the National Office Examination function.


Background: We have previously raised our concern and disagreement with some of the directions provided on SFR processing in the March 1, 1988, joint memorandum from the Assistant Commissioners, Examination and Collection (Attachments 1 and 2). Our concerns, along with action you have taken, have had an impact on changing the policy on reconsideration cases and allowing assessment in undelivered mail cases (Attachments 3, 4 and 5).

The issue of allowing joint filing in certain SFR situations, however, remains a problem for us. The October 24, 1988, joint memorandum from the Assistant Commissioners, Examination and Collection (Attachment 6) restates the position that the issuance of a Notice of Deficiency on an SFR case will prevent the taxpayer from filing a joint return if the return is filed more than 3 years from the original due date. We have several reservations about this decision.


Legal Arguments: IRC 6013 provides for taxpayers to elect joint filing status. IRS 6013(b) limits the changing to a joint election after a separate return has been filed (Attachment 7). It is the Service's position that a separate return prepared by the Service under IRC 6020(b) constitutes a filed return for purposes of IRC 6013(b)(2). This position is stated in Revenue Ruling 70-632 (Attachment 8). Once a separate return has been filed the taxpayer can only make the change to joint filing in this situation if he meets the criteria in IRC 6013(b)(2). This position was upheld in *Durovic vs. Commissioner* 54 TC 1364(1970) and in numerous subsequent cases.

Although there has been some interpretation that IRC 6013(b)(2) implies that a joint election cannot be made after 3 years from the due date of the return, regardless of whether there was an original filing or not, this is clearly not the case. Revenue Ruling 72-539 states that a joint election can be made at any time if the return for the year in question had never been filed previously (Attachment 9).

Regional Commissioner
Southwest Region

Recently judicial decisions in Phillips vs. Commissioner 86 TC 433,440 (1986), and Britt vs. Commissioner TC Memo 88-419, Docket No. 663-87, 09-06-88 (Attachments 9 and 10) have held that the return filed under 6020(b) does not constitute a return for the purposes of IRC 6013(b). 

Counsel in Western Region on April 22, 1988, issued an opinion that taxpayers should be allowed to make a joint election on an untimely filed return as long as neither spouse has previously filed a return (Attachment 11). Western Region adopted this position pending direction from the National Office (Attachment 12).

Problems: The SFR program should have as its ultimate goal the securing of a correct return and collection of the proper tax. Additionally, we want to bring taxpayers into voluntary compliance with the tax laws. Although we may be able to advance the legal argument that the taxpayer must pay the higher tax resulting from a separate return, does this support the above objectives? 

Currently taxpayers are allowed to file joint returns more than 3 years from the due date as long as a Notice of Deficiency has not been issued. This means that a non-filing taxpayer we have either chosen not to pursue or where we have not yet issued the Notice of Deficiency, gets the benefit of the joint election, while a taxpayer in the same situation who has had an SFR Notice of Deficiency issued cannot.

Another possible scenario could be a delinquent taxpayer that has not filed a return since 1981. Because of the recent National Office decision not to pursue years 1983 and prior, we would only issue a Notice of Deficiency on 1984 and subsequent. If the taxpayer voluntarily filed all delinquent returns as joint returns, we would allow the joint filing for 1982 and 1983, but not for 1984.

The matter could be further complicated by the recent Mulder vs. Commissioner decision that found our Notice of Deficiency invalid since we did not make sufficient attempts to locate the most current address for the taxpayer. We could be faced with a situation where we make an assessment based on undelivered mail, but subsequently locate the taxpayer while attempting to collect the TDA. The taxpayer could argue that we do not have a valid Notice of Deficiency and, therefore, he/she should be able to make a joint election.

Under our current reconsideration system, if the statutory notice was not received by the taxpayer, we would allow the taxpayer to provide us with the required information. There is no policy now on whether we would allow joint filing in this situation.

Regional Commissioner
Southwest Region

There is currently no procedure to advise taxpayers that in SFR proceedings, once a Notice of Deficiency is issued, we will not accept a return with a joint filing election if the return is more than 3 years past due. We should inform the taxpayers in our letters that if they do not file a return prior to issuing a Notice of Deficiency, they may be barred from filing a joint return.

There are no guidelines on how we should process returns when we will not allow the joint filing election. Procedures need to be developed for the various situations that may occur. (For example, how is a joint return with additional income from a spouse not included in our SFR proposal to be processed in order to ensure consistent handling of taxpayers?)

District office personnel, including problem resolution officers, have apprised us of the difficulties they have encountered. We have had incidents where Ogden has not allowed the joint filing election, but the district offices have accepted the return and processed an adjustment. Revenue officers have experienced problems in collecting assessments that are significantly greater than would exist if joint filing was allowed.

Summary: There are two different interpretations of the applicability of IRC 6013(b) to SFR cases. The Service has chosen to hold to the position that this section applies to SFR cases, hence a joint filing election cannot be made on returns over 3 years delinquent. There are numerous problems resulting from this decision including questions as to how this decision assists the Service in accomplishing its goals. Are we collecting the proper amount of tax? Does this decision warrant the highest degree of public confidence in our fairness? Does this interpretation of IRC 6013(b) help us achieve voluntary compliance? What is being done to advise the public of their rights and responsibilities in this area? We believe that this decision is not in keeping with our mission statement. Furthermore, there are many unresolved issues that need to be dealt with if the Service's position remains that joint elections cannot be made in these cases. These issues deal primarily with consistency in approach.

Recommendation: The above discussed problems could be resolved if the Service's policy was that IRC 6013(b) applies only to a taxpayer's filed return, not to Service prepared returns.

If you or your staff have any questions regarding the above, please have them contact Tim Towns at FTS 586-7175.

Director

Attachments