



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

OFFICE OF
CHIEF COUNSEL

UILC: 6501.00-00
6213.07-01

Date: 09/23/1999

Number: **199951015**
Release Date: 12/23/1999

CC:DOM:IT&A:4
SPR-109885-99

MEMORANDUM FOR CHIEF, ACCOUNTS RESOLUTION BRANCH
OP:C:A:A

FROM: Acting Assistant Chief Counsel (Income Tax & Accounting)
CC:DOM:IT&A

SUBJECT: Mathematical Error Determination

LEGEND

Taxpayers =

District Counsel =

Service Center =

X =

Year =

Date A =

Date B =

Date C =

Date D =

Date E =

This responds to your request for assistance dated May 24, 1999, in connection with questions posed by the Service Center. You have asked us to

consider certain issues that arose when an amended income tax return (Form 1040X) was received just prior to the expiration of the statute of limitations for assessment. The amended return shows an increased amount of tax for Year on line 12, but shows \$0 as the amount owed on line 22. In addition, an attachment to the amended return states that the amended return is a protective amendment and that no tax will be owed for Year unless Taxpayers prevail in a case docketed in the Tax Court for other tax years concerning the reporting of income and losses from X.

Issues

1. Whether the Service made a timely and valid assessment of the additional tax shown on Taxpayers' Form 1040X because the Service was allowed an additional 60 days for making the assessment under § 6501(c)(7) of the Internal Revenue Code.
2. Whether the Taxpayers made a mathematical or clerical error, as defined in § 6213(g)(2) of the Code, in showing a zero amount owed on Form 1040X.
3. Whether the notice of deficiency sent to Taxpayers is valid.

Conclusions

1. The 60-day extension period under § 6501(c)(7) of the Code was not in effect because Taxpayers indicated that no additional tax was currently owed and that additional tax would be owed only if certain events occurred at a future time. Thus, the assessment of the additional tax shown on Taxpayers' Form 1040X was untimely and invalid.
2. Taxpayers' return did not contain a mathematical or clerical error as defined under § 6213(g)(2) of the Code because the discrepancy between the total tax amount on line 12 and the zero amount owed on line 22 was intentional. Accordingly, in order for additional tax to be assessed, the Service must follow deficiency procedures.
3. The notice of deficiency sent to Taxpayers is invalid because § 6501(c)(7) of the Code never extended the statute of limitations for assessment.

Facts

Taxpayers filed Form 1040X, Amended U.S. Individual Income Tax Return, for Year, which was received by the Service on Date A, three days prior to the expiration of the statute of limitations on assessment. Taxpayers had previously extended the statute of limitations by signing a waiver. The amended return shows \$0 as the amount of tax owed, contains a notation indicating that it was filed as a

“protective amendment,” and includes an attachment stating that if Taxpayers prevail in Tax Court on the reporting of income and losses from X for other tax years, Taxpayers will owe an additional amount in tax for Year. An assessment, based on the amount of tax shown on the Form 1040X, was made on Date B after the expiration of the statute of limitations, but within 60 days of Date A.

District Counsel subsequently advised the Service Center to send a mathematical error notice to Taxpayers. The basis for sending the mathematical error notice was that Taxpayers incorrectly calculated the amount owed as \$0 on line 22 of the amended return. A positive figure should appear on line 22 because the total tax amount on line 12, column (c), exceeds the amount shown on line 21. Thus, it could be argued that the amended return contains an error in subtraction in computing the amount owed. The Service Center sent the mathematical error notice to Taxpayers on Date C, which was within 60 days of Date A.

On Date D, one day after Date C, Taxpayers’ attorney requested the Service Center to abate the assessment from the mathematical error notice. The Service Center did not abate the assessment. The Service Center’s position is that there was no mathematical error because Taxpayers’ error was in computing the amount owed, not in computing the total tax figure (line 12).

District Counsel requested that the Service Center abate the tax assessment and send a notice of deficiency to Taxpayers. The Service Center did not abate the assessment, but did send the notice of deficiency to Taxpayers on Date E, which was within 60 days of Date A.

Discussion

Section 6213(a) of the Internal Revenue Code generally provides that within 90 days after a notice of deficiency is mailed, the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. In addition, § 6213 provides that the Service shall make no assessment of a deficiency during the 90-day period.

Section 6213(b)(1) of the Code provides, in part, that if a taxpayer is notified that, on account of a mathematical or clerical error appearing on the return, an amount of tax in excess of that shown on the return is due, and that an assessment of the tax has been or will be made on the basis of what would have been the correct amount of tax but for the mathematical or clerical error, such notice shall not be considered as a notice of deficiency for purposes of § 6213(a). Further, the taxpayer shall have no right to file a petition with the Tax Court based on such notice, nor shall assessment be prohibited by the provisions of § 6213.

Section 6213(b)(2) of the Code provides for a stay of collection for 60 days after a mathematical error notice is sent. If the taxpayer request abatement of the assessment during this 60 day period, the assessment must be abated, and any reassessment is subject to deficiency procedures.

Section 6213(g)(2)(A) of the Code provides that the term “mathematical or clerical error” includes an error in addition, subtraction, multiplication, or division shown on any return.

Section 6213(g)(2)(C) provides that the term “mathematical or clerical error” includes an entry on a return of an item which is inconsistent with another entry of the same or another item on such return.

Section 6501(a) of the Code provides that, except as otherwise provided in § 6501, any tax imposed by this Title 26 shall be assessed within three years after the return was filed (whether or not such return was filed on or after the date prescribed).

Section 6501(c)(7) of the Code provides, in general, that if, within the 60-day period ending on the last day for assessing the tax, the Secretary receives an amended return or other written document signed by the taxpayer showing the taxpayer owes an additional amount of tax, the period for the assessment of that additional amount shall not expire before the day 60 days after the day on which the Secretary receives the amended return or other document.

Issue 1

The first issue involves the 60-day extension period under § 6501(c)(7) of the Code. We conclude that the Service made an untimely and invalid assessment on Date B based upon the amended return filed by Taxpayers. Taxpayers purposely stated that the tax owed on the amended return was \$0 by showing this amount on line 22. In addition, Taxpayers attached a statement that the amended return was a protective amendment and that tax would be owed only if certain future events occurred. Under these circumstances it is evident that Taxpayers did not provide a self-assessing document to the Service. The situation in this case is similar to that of court cases in which returns were filed showing amounts of tax, but the taxpayers indicated that they did not intend for any tax to be assessed. See Penn Mutual Indemnity Co. v. Commissioner, 32 T.C. 653 (1959), aff'd 277 F.2d 16 (3d Cir. 1960); John A. Gebelien, Inc v. Commissioner, 37 B.T.A. 605 (1938); and Continental Accounting & Audit Co., 2 B.T.A. 761 (1925).

In Penn Mutual Indemnity Co., the taxpayer filed a “U.S. Mutual Insurance Company Income Tax Return” that showed an amount of gross income, the rate of tax, and an amount of total income tax. However, attached to the return was a letter stating that the income tax as applied to the taxpayer was invalid and

unconstitutional. The Commissioner took the position that there was no deficiency and assessed the amount shown as tax on the return as the amount owed by the taxpayer. The concurring opinion in Penn Mutual Indemnity Co., 32 T.C. 653, at 667-668, stated that the return was not a self-assessing document and that the deficiency procedures needed to be followed for the Service to properly assess and collect the tax.

In this case, as in Penn Mutual Indemnity Co., Taxpayers showed an amount of income tax for Year on the amended return, but indicated in an attached statement that no tax was currently owed. Thus, there is no self-assessing document filed by Taxpayers and the 60-day extension period under § 6501(c)(7) of the Code is not applicable in this case. This conclusion is supported by the legislative history for § 6501(c)(7), which states that the 60-day period is extended solely to allow the Service to process the amendment and assure that the additional tax due as reported by the taxpayer may be assessed and collected. See H.R. Rep. No. 98-432, pt 2, at 1557 (1984); S. Rep. No. 98-169, vol. 1, at 792 (1984); H.R. Conf. Rep. No. 98-861, at 1123 (1984).

The Service Center must abate the invalid assessment made on Date B because the 60-day extension period under § 6501(c)(7) was not in effect and the statute of limitations on assessment had expired before Date B. See § 6404(a)(2).

Issue 2

The second issue is whether there is a mathematical or clerical error on Taxpayers' amended return. We agree with the Service Center that there was no mathematical or clerical error on the amended return. However, our reasoning differs from that of the Service Center. First, Taxpayers' placement of \$0 on line 22 was not the result of a computational error, within the meaning of § 6213(g)(2)(A). The term "error" in § 6213(g)(2)(A) refers to a computational mistake that is not intended by the taxpayer. Taking into account the statement attached to the amended return, it is clear that there was no mistake in the present case. Taxpayers intentionally reported \$0 as the amount owed on line 22. This is consistent with the Taxpayers' position that no tax is currently owed for Year and that tax will be owed only if certain determinations are made by the Tax Court for other years.

Secondly, with respect to an "inconsistent entry" mathematical or clerical error under § 6213(g)(2)(C), the legislative history for that provision states that the summary assessment procedure is not to be used "where it is not clear which of the inconsistent entries is the correct one" or "where the Service is merely resolving an uncertainty against the taxpayer." See H.R. Rep. No. 94-658, at 291 (1976). In the present case, it is not clear that the entry on line 12 is the correct one; in fact, the attached statement addressed the inconsistency and explained that agreement to the liability on line 12 was contingent on the occurrence of certain future events.

None of the other mathematical or clerical error provisions enumerated under § 6213(g)(2) are relevant to this case. Because there is no mathematical or clerical error as defined under § 6213(g)(2), the Service must follow deficiency procedures in order for additional tax to be assessed.

Issue 3

The third issue is whether the notice of deficiency sent to Taxpayers is valid. We conclude that the notice of deficiency is not valid. A valid notice of deficiency must be sent prior to the expiration of the statute of limitations on assessment. See Virgin v. Commissioner, T.C. Memo. 1991-63 (1991), citing Coleman v. Commissioner, 94 TC 82, 90 (1990). In this case, the Service sent Taxpayers the notice of deficiency during, what appeared to be, the 60-day extension period under § 6501(c)(7). However, as previously discussed, the 60-day extension period under § 6501(c)(7) never applied to this case. Thus, the statutory notice of deficiency is invalid because it was sent after the expiration of the statute of limitations on assessment.

If you have any questions or concerns regarding this memorandum, please contact Brad Taylor at (202) 622-4940.

HEATHER C. MALOY

By: _____
MICHAEL GOMPERTZ
Assistant to Chief, Branch 4
Income Tax and Accounting Division