



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

OFFICE OF
CHIEF COUNSEL

September 5, 2000

Number: **200052004**
Release Date: 12/29/2000
CC:PA:APJP:B02
TL-N-3344-00

UILC: 6013.02-01

INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

MEMORANDUM FOR DELAWARE-MARYLAND ASSISTANT DISTRICT COUNSEL
CC:SER:DEM:WAS
Attn:

FROM: Assistant Chief Counsel (Administrative Provisions & Judicial
Practice) CC:PA:APJP

SUBJECT: Joint Return After Filing Separate Return

This Field Service Advice responds to your memorandum dated June 5, 2000. Field Service Advice is not binding on Examination or Appeals and is not a final case determination. This document is not to be used or cited as precedent.

DISCLOSURE STATEMENT

Field Service Advice is Chief Counsel Advice and is open to public inspection pursuant to the provisions of section 6110(i). The provisions of section 6110 require the Service to remove taxpayer identifying information and provide the taxpayer with notice of intention to disclose before it is made available for public inspection. Sec. 6110(c) and (i). Section 6110(i)(3)(B) also authorizes the Service to delete information from Field Service Advice that is protected from disclosure under 5 U.S.C. § 552 (b) and (c) before the document is provided to the taxpayer with notice of intention to disclose. Only the National Office function issuing the Field Service Advice is authorized to make such deletions and to make the redacted document available for public inspection. **Accordingly, the Examination, Appeals, or Counsel recipient of this document may not provide a copy of this unredacted document to the taxpayer or their representative.** The recipient of this document may share this unredacted document only with those persons whose official tax administration duties with respect to the case and the issues discussed in the document require inspection or disclosure of the Field Service Advice.

LEGEND

Taxpayer =
Year 1 =

ISSUES

(1) Whether Taxpayer, who previously filed a Year 1 return claiming head of household filing status, may file a Year 1 return with his spouse electing joint filing status after the Taxpayer has filed a timely petition with the Tax Court with respect to a notice of deficiency issued for Year 1.

(2) Whether the Commissioner is bound by erroneous advice given by a revenue agent regarding Taxpayer's ability to elect to joint filing status.

CONCLUSIONS

(1) Section 6013(b)(2) prevents Taxpayer and his spouse from electing a joint filing status.

(2) If the revenue agent gave Taxpayer erroneous advice regarding entitlement to joint filing status, the Commissioner is not bound by the erroneous advice.

FACTS

For Year 1, the tax year in issue, taxpayer filed his Federal income tax return claiming head of household filing status. Later, the Commissioner issued a notice of deficiency to Taxpayer for Year 1 determining, among other things, that Taxpayer's was not entitled to head of household status and that Taxpayer's proper filing status was married filing separately. Taxpayer filed a timely petition with the Tax Court claiming, among other things, that the Commissioner's adjustment to his filing status was improper.

During the course of settlement negotiations, Taxpayer admitted that he is not entitled to head of household filing status. However, Taxpayer now contends that he and his wife should be allowed to file a joint Federal income tax return because his proper filing status for Year 1 is "married, filing jointly." Taxpayer further contends that he should be allowed to file a joint Federal income tax return because the Commissioner's revenue agent advised him that this would be permissible and he relied on the advice.

LAW AND ANALYSIS

Issue 1

Section 6013(a) of the Internal Revenue Code provides generally that a husband and wife may make a single return jointly of income taxes. However, where a prior separate return has been filed, the election of joint filing status is subject to the requirements of section 6013(b).

Section 6013(b)(1) provides that if an individual has filed a separate return for a taxable year for which a joint return could have been made, the individual and his spouse may file a joint return even if the time prescribed for filing for such taxable year has expired. Section 6013(b)(2) provides four limitations to this joint return election. One limitation, under section 6013(b)(2)(B), is that the election may not be made after there has been mailed to either spouse as to the tax year involved a notice of deficiency, if the spouse, as to such notice, files a petition with the Tax Court within the time prescribed in section 6213. Another limitation, under section 6013(b)(2)(A), is that joint filing status cannot be elected after the expiration of 3 years from the last date prescribed by law for filing the return for the taxable year (determined without regard to any extension of time granted to either spouse).

The Tax Court has strictly applied the limitation in section 6013(b)(2)(B), which was explained in Currie v. Commissioner, T.C. Memo. 1986-71, as follows:

Under the clear language of the statute, the right of each petitioner to elect to file a joint return after having first filed separate returns was terminated after respondent mailed a notice of deficiency to a spouse and that spouse timely filed a petition with the Tax Court with respect to the taxable year in issue. Section 6013(b)(2)(C);¹ Druker v. Commissioner, 77 T.C. 867, 873 (1981), affd. on this issue 697 F.2d 46 (2d Cir. 1982). The statutory language is clear and unambiguous. This Court has no authority to expand the explicit terminology of the statute. Donigan v. Commissioner, 68 T.C. 632 (1977). We must apply the law as written.

In Glaze v. United States, 641 F.2d 339 (5th Cir. 1981), the executor of one spouse's estate and the surviving spouse claimed a refund based on an amended joint return after a state court determined the parties had met the requirements for a

¹ Section 6013(b)(2)(C) is the predecessor to section 6013(b)(2)(B).

valid common-law marriage. The joint return was filed within 3 years of the filing of the return for which tax was paid, but more than 3 years after the due date, contrary to section 6013(b)(2)(A). However, the court reasoned that, because section 6013(b)(1) referred to an individual who had “filed a separate return,” the restrictive rule in section 6013(b)(2) applied only to taxpayers who filed as married filing separately under section 1(d) and not to taxpayers who had filed as unmarried. Thus, the taxpayers, who had both shown an unmarried filing status on their original returns, were not barred under the predecessor of section 6013(b)(2)(A) from electing to file a joint return more than 3 years after the original due date for filing the joint return.

The Service announced in Rev. Rul. 83-183, 1983-2 C.B. 220, that it would not follow Glaze. In Rev. Rul. 83-183, the Service concluded that the reference to prior separate returns in section 6013(b) should be viewed as a reference to the filing of any non-joint return under sections 1(b) (head of household), 1(c) (unmarried), or 1(d) (married filing separately). This view is supported by Saniewiski v. Commissioner, T.C. Memo. 1979-337, which holds that an individual who had originally filed as unmarried is barred from filing a joint return after that individual filed a petition with the Tax Court. Similarly, Blumenthal v. Commissioner, T.C. Memo. 1983-737, holds that an individual who filed as a head of household could not later file a joint return after filing a petition with the Tax Court. See also Phillips v. Commissioner, 86 T.C. 433, 440 (1986), aff'd in part and rev'd in part on another issue, 851 F.2d 1492 (D.C. Cir. 1988), in which the Tax Court stated that in Glaze the Fifth Circuit’s reading of “separate return” in section 6013(b) was too narrow.

In this case, Taxpayer filed a return claiming head of household status. Taxpayer cannot later obtain joint filing status with his spouse after receiving, with respect to the earlier return, a notice of deficiency as to which Taxpayer filed a timely petition with the Tax Court. Section 6013(b)(2)(B) specifically bars the filing of a joint return in this situation. The prohibition against filing the joint return is applicable whether the filing status for the earlier return was married filing separate, head of household, or unmarried. Rev. Rul. 83-183, 1983-2 C.B. 220, supra.

Issue 2

It is well settled that the Commissioner is not bound by the erroneous advice of his agents, especially when the advice is contrary to statute. Dixon v. United States, 381 U.S. 68 (1965). Furthermore, with respect the filing of a joint return, the Tax Court has held that under no circumstances may a revenue agent waive the statutory conditions under which an effective joint return can be filed. Kirby v. Commissioner, 35 T.C. 306 (1960). See also Mazanek v. Commissioner, T.C.

Memo. 1984-633 (Internal Revenue Service not bound by erroneous instructions concerning the filing of a joint return).

In the instant case, even if the revenue agent gave Taxpayer erroneous advice regarding entitlement to joint filing status, the Commissioner is not bound by the erroneous advice. Therefore, Taxpayer and his spouse are not entitled to joint filing status for the tax year in issue.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

There are no significant litigating hazards with respect to the issues addressed if the case is not appealable to the Fifth Circuit. However, if the case were appealable to the Fifth Circuit, Glaze would present a litigating hazard in light of the Fifth Circuit's opinion in Glaze that the restrictive rule of section 6013(b)(2) applies only to taxpayers who filed as married filing separately under section 1(d).

Please call Willie E. Armstrong, Jr. at (202) 622-7920 if you have any further questions.

CURTIS G. WILSON

By: _____
Michael L. Gompertz
Assistant to Branch Chief,
Branch 2