Office of Chief Counsel
Internal Revenue Service

memorandum

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to: LEWIS J. ABRAHAMS, ASSOCIATE AREA COUNSEL
(SMALL BUSINESS/SELF EMPLOYED)
CC:SB:1:LI
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from: James Gibbons, Chief, Branch 1
Administrative Provisions and Judicial Practice
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subject: Waivers to Assess Tax After Notice of Deficiency, SCAF-145686-02

This Chief Counsel Advice responds to your memorandum dated October 2, 2002, requesting Significant Service Center Advice on behalf of the Brookhaven Campus. In accordance with I.R.C. § 6110(k)(3), this Chief Counsel Advice should not be cited as precedent.

ISSUE

Whether a signed waiver of the restrictions on assessment sent to the Service after the Service initiates deficiency procedures and assesses the tax should be considered a return of the taxpayer for statute of limitations purposes.

CONCLUSION

A signed waiver of the restrictions on assessment sent to the Service after the Service initiates deficiency procedures and assesses the tax should generally not be considered a return of the taxpayer for statute of limitations purposes.

FACTS

The taxpayer failed to prepare a federal income tax return for the 1992 tax year. A substitute for return was prepared by the Service and was posted as of May 8, 1995. A

notice of deficiency was issued as of May 19, 1995, and the tax was assessed on November 27, 1995, after the default of the notice of deficiency.

Almost seven years later, the taxpayer submitted a signed Form 5564 Waiver and Letter 2566SC/CG, both dated May 5, 2002, consenting to the immediate assessment and collection of the deficiency amount. Waivers on assessment and collection are not signed under penalties of perjury.

When received, the waiver was treated as a return. Based on the receipt of the signed waiver, the failure to file penalty, initially assessed at 25% of the deficiency, was partially abated to 22.5% of the deficiency and the failure to pay penalty was assessed at 0.5% per month on the unpaid deficiency. See I.R.C. § 6651(c), IRM 20.1.2.3.1(2). In addition, since the waiver was treated as a return, it was also treated as commencing the running of the assessment statute of limitations.

After the adjustments were made, the Service Center questioned whether a signed waiver, received after the tax was assessed, should be treated as a return.

LAW AND ANALYSIS

In making the determination of whether a given document should be treated as a return for statute of limitation purposes, it is helpful to review the case law on this issue. In an early case addressing what constitutes a return for purposes of the statute of limitations on assessment, the Supreme Court indicated that a "defective" or "incomplete" return may be sufficient to start the running of the period of limitation if it is a specific statement of the items of income, deductions, and credits in compliance with the statutory duty to report information. To have such effect, however, the return must honestly and reasonably be intended as such. *Florsheim Bros. Drygoods Co. v. United States*, 280 U.S. 453 (1930).

In *Zellerbach Paper Co. v. Helvering*, 293 U.S. 172 (1934), the taxpayer filed its original income and profits tax return for its fiscal year ending April 30, 1921, in July 1921. Although the Revenue Act of 1921 required taxpayers to file a new or supplemental income and profits tax return if the original return had been prepared pursuant to the provisions of the Revenue Act of 1918 and additional tax was due under the Revenue Act of 1921, the taxpayer did not file a new or supplemental return. When the Commissioner issued a deficiency notice to the taxpayer in May 1928, the taxpayer alleged that the notice was barred because the period of limitations for assessment had expired. The Commissioner argued that the period of limitations for assessment had not begun because the return he received from the taxpayer in July 1921 was a nullity. The Supreme Court disagreed and determined that the period of limitations had expired. The Court concluded that, for purposes of the statutes of limitations,

> perfect accuracy or completeness is not necessary to rescue a return from nullity, if it purports to be a return, is sworn to as such, and evinces an honest and genuine endeavor to satisfy the law. This is so even though at

> the time of filing the omissions or inaccuracies are such as to make amendment necessary.

293 U.S. at 180 (citation omitted).

The most recent Supreme Court reaffirmation of the test articulated in *Florsheim* and *Zellerbach* is found in *Badaracco v. Commissioner,* 464 U.S. 386 (1984). There, the taxpayer filed a return which he conceded was “false or fraudulent with the intent to evade law.” *Id.* at 393. He later filed a nonfraudulent amended return. The taxpayer argued that the original return, to the extent it was fraudulent, was a nullity for purposes of the statute of limitations. The Court disagreed, noting that the fraudulent original returns

> "purported to be returns, were sworn to as such, and appeared on their faces to constitute endeavors to satisfy the law. Although those returns, in fact, were not honest, the holding in *Zellerbach* does not render them nullities.”

Id. at 397.

The lower courts have subsequently synthesized the criteria enunciated by the Supreme Court into the following four-part test for determining whether a defective or incomplete document is a valid return: "First, there must be sufficient data to calculate tax liability; second, the document must purport to be a return; third, there must be an honest and reasonable attempt to satisfy the requirements of the tax law; and fourth, the taxpayer must execute the return under penalties of perjury." *Beard v. Commissioner*, 82 T.C. 766, 777 (1984), *aff'd per curiam,* 793 F.2d 139 (6th Cir. 1986).

This generally accepted formulation of the criteria for determining a valid return is known as the "substantial compliance" standard. If a defective or incomplete document meets the substantial compliance standard, the document is a valid return for purposes of the statute of limitations on assessment and for purposes of determining the failure to file penalty of section 6651(a) of the Code. A document that does not meet the substantial compliance standard is a nullity for purposes of the Code.

Under the circumstances of this case, the signing of a waiver does not qualify as a return under the substantial compliance standard set forth in *Beard*. First, the waiver is not signed under penalties of perjury. Section 6065 of the Code, entitled Verification of returns, provides:

> Except as otherwise provided by the Secretary, any return, declaration, statement, or other document required to be made under any provision of the internal revenue laws or regulations shall contain or be verified by a written declaration that is made under penalties of perjury.

The rationale behind the importance of the jurat is that it is with the jurat that the taxpayer attests to the truthfulness and accuracy of his return. A return that is not sworn under penalties of perjury does not contain the requisite information to determine the correctness of the return.

In addition, a waiver signed and submitted under these circumstances also fails to qualify as a return because in most circumstances it fails to constitute an honest and reasonable attempt to satisfy the requirements of the tax law. The waiver in this case was filed long after the Service had prepared a substitute for return and made a formal assessment. The taxpayer had an opportunity to file a Form 1040 but failed to do so. The taxpayer had the opportunity to aid the Service in determining the correct tax liability by signing the waiver before assessment, or participating in the statutory notice and Tax Court procedures but failed to participate in these procedures. Thus, under these circumstances, the taxpayer generally has not made a reasonable or honest attempt to comply with the tax laws. The determination of whether a particular document constitutes an honest and reasonable attempt to comply with the tax laws, however, is made on a case by case basis. Consequently, a taxpayer may able to meet this prong of the substantial compliance if he can show that the document in question was submitted with the subjective intent to comply with his tax obligations.

Rev. Rul. 74-203, 1974-1 C.B. 330, promulgated before the Tax Court issued its opinion in *Beard*, is distinguishable. In Rev. Rul. 74-203, the taxpayers failed to file a return, but voluntarily made their books and records available for the Service to determine their tax liability. The Service noted that I.R.C. § 6020(a) permits the Service to prepare and receive a return that is signed by the taxpayer in circumstances where the taxpayer fails to make a return but consents to disclose information necessary for its preparation. In *In re Wright*, 244 B.R. 451, 455 (Bankr. N.D. Cal. 2000), the court discussed the underlying rationale for the Revenue Ruling:

> Although none of the forms specified in the Revenue Ruling require the taxpayer to sign under penalty of perjury, they are all executed under circumstances where the IRS has computed the taxpayer's tax liability. By signing the form, the taxpayer consents to the amounts so computed and permits the taxes to be immediately assessed without requiring the IRS to follow the notice of deficiency process. In this important respect, the effect of the taxpayer's signing these forms is the same as the effect of the debtor's filing a return.

Thus, Rev. Rul. 74-203, limited to circumstances where the taxpayer cooperates by consenting to disclose information necessary for the preparation of the 6020(a) return, and signs the waiver prior to the issuance of the notice of deficiency, is distinguishable from this case.

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Please call if you have any further questions.