



OFFICE OF
CHIEF COUNSEL

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224
January 16, 2001

Number: **200107035**
Release Date: 2/16/2001

CC:PA:APJP:1:AJKeyso
TL-N-4417-00
UIL 6011.06-00; 6065.06-00

MEMORANDUM FOR ASSOCIATE AREA COUNSEL
AREA 5, SALT LAKE CITY

FROM: Blaise G. Dusenberry
Acting Senior Technician Reviewer, Branch 1
(Administrative Provisions & Judicial Practice) CC:PA:APJP:1

SUBJECT: Significant Service Center Advice: Altered Tax Forms

This responds to your request for Significant Service Center advice in connection with questions posed by the Ogden Submission Processing Center. We have restated the issues as follows:

ISSUES

1. Whether a Form 1040 on which the taxpayer has altered certain official line titles or has altered the jurat constitutes a valid income tax return.
2. Whether a taxpayer's "homemade" income tax form constitutes a valid income tax return.
3. Whether an altered Form 1040 or a homemade income tax form that constitutes a valid income tax return also constitutes a "processable" return within the meaning of section 6611(g) of the Internal Revenue Code.
4. Whether a taxpayer who files an altered Form 1040 or a homemade income tax form may be subject to the frivolous return penalty of section 6702 of the Internal Revenue Code.

CONCLUSIONS

1. In the case of an official Form 1040 on which the taxpayer has altered official line titles to claim unallowable deductions or exclusions from income, the Service may treat the Form 1040 as a nullity provided there is sufficient evidence on or attached to Form 1040 indicating a lack of honest and reasonable attempt on the part of the taxpayer to comply with the tax laws.

TL-N-4417-00

In the case of an official Form 1040 on which the taxpayer has obliterated the jurat, the Service may treat a document as a nullity. However, where the taxpayer simply adds language to the jurat, the Service must consider whether the addition negates or casts doubt upon the jurat. If the addition negates or casts doubt upon the jurat, the Service may treat the Form 1040 as a nullity. If the addition does not negate or cast doubt upon the jurat, the Service should treat the Form 1040 as a valid return.

2. In the case of a homemade income tax form, we suggest that the Service analyze the form to determine whether it contains items of gross income and deductions. If so, we suggest the Service correspond with the taxpayer and request that the taxpayer perfect the document using Form 1040. If the homemade form does not contain items of gross income and deduction, but simply protests the tax laws, we suggest that the Service treat the document as a nullity, and advise the taxpayer that he or she has failed to file a valid income tax return.
3. An official Form 1040 on which line titles have been altered or the jurat obliterated does not constitute a “processable” return within the meaning of section 6611(g) of the Internal Revenue Code. Also, a homemade income tax return does not constitute a “processable” return within the meaning of section 6611(g).
4. A taxpayer who files an altered Form 1040 or a homemade income tax form is filing a purported return within the meaning of section 6702 of the Code and therefore may be subject to the frivolous return penalty. If the jurat of the return is altered, a determination must be made whether the alteration has changed the meaning of the jurat. If it has not, the statement may be an exercise of free speech or an insignificant addition and therefore not subject to section 6702. However, if it does change the meaning of the jurat, the frivolous return penalty may apply.

FACTS

Taxpayers file a variety of different documents purporting, on their face, to be income tax returns. In some instances, taxpayers alter an official Form 1040 by deleting certain lines on the form and by substituting their own language for the preprinted line titles or captions. Taxpayers may also obliterate, add language to, or alter the penalties of perjury statement (the “jurat”).

Some taxpayers file their own “homemade” income tax forms in lieu of the official Form 1040. Taxpayers provide varying amounts on information regarding their income and deductions on these unofficial forms, and may or may not attach Forms W-2.

TL-N-4417-00

You note that these altered Forms 1040 and homemade income tax forms impede the ability of the Internal Revenue Service (Service) to process returns in an efficient and consistent manner. Further, you note that the Service is sometimes unable to immediately detect alterations to Forms 1040, resulting in taxpayers receiving tax refunds to which they are not legally entitled. You request our advice on a variety of issues regarding the status of these documents as “income tax returns.” You are particularly interested in a “bright line” test that the Submission Processing Center may apply for purposes of determining whether to treat a document as a return, and for purposes of determining whether to impose the frivolous return penalty on such documents.

LAW & ANALYSIS

ISSUE 1

Valid Returns: In General

Section 6011 of the Internal Revenue Code (Code) provides that when required by regulations prescribed by the Secretary any person made liable for any tax imposed by this title, or with respect to the collection thereof, shall make a return or statement according to the forms and the regulations prescribed by the Secretary. Every person required to make a return or statement shall include therein the information required by such forms and regulations.

Section 1.6011-1(b) of the Income Tax Regulations provides, in part:

(b) Use of prescribed forms. Copies of the prescribed return forms will so far as possible be furnished taxpayers by district directors. A taxpayer will not be excused from making a return, however, by the fact that no return form has been furnished to him. Taxpayers not supplied with the proper forms should make application therefor to the district director in ample time to have their returns prepared, verified, and filed on or before the due date with the internal revenue office where such returns are required to be filed. . . . In the absence of a prescribed form, a statement made by a taxpayer disclosing his gross income and the deductions therefrom may be accepted as a tentative return, and, if filed within the prescribed time, the statement so made will relieve the taxpayer from liability for the addition to tax imposed for the delinquent filing of the return, provided that without unnecessary delay such a tentative return is supplemented by a return made on the proper form.

Section 1.6012-1 of the regulations identifies individuals required to make returns of income. Section 1.6012-1(a)(6) prescribes Form 1040 as the form for making the income tax return required of an individual.

TL-N-4417-00

The Service's broad authority to prescribe the manner of filing has been recognized by the Supreme Court. In Commissioner v. Lane-Wells Co., 321 U.S. 219, 223 (1944), the Court indicated:

Congress has given discretion to the Commissioner to prescribe by regulation forms of returns and has made it the duty of the taxpayer to comply. It thus implements the system of self-assessment which is so largely the basis of our American scheme of income taxation. The purpose is not alone to get tax information in some form but also to get it with such uniformity, completeness, and arrangement that the physical task of handling and verifying returns may be readily accomplished.

The Court of Appeals for the Eighth Circuit has noted:

Taxpayers are required to file timely returns on forms established by the Commissioner. . . . The Commissioner is certainly not required to accept any facsimile the taxpayer sees fit to submit. If the Commissioner were obligated to do so, the business of tax collecting would result in insurmountable confusion.

Parker v. Commissioner, 365 F.2d 792 (8th Cir. 1966).

Despite the Service's broad authority to prescribe the manner of filing, the issue of what constitutes a valid return is frequently litigated. In an early case addressing the issue, 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. However, to have such effect, the return must honestly and reasonably be intended as such. Florsheim Bros. Drygoods Co. v. United States, 280 U.S. 453 (1930).

Subsequently, the Court summarized the criteria as: "[p]erfect 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." Zellerbach Paper Co. v. Helvering, 293 U.S. 172, 180 (1934).

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 fraudulent original income tax return and followed it with 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."

TL-N-4417-00

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.

Altered Line Titles or Captions

Beard v. Commissioner, *supra*, is the leading case addressing altered Forms 1040. In Beard, the taxpayer altered an official Form 1040 by masking various line titles and captions in the "Income" and "Adjustments to Income" sections of the form. In the "Income" section, the taxpayer changed the caption and line titles from "Income" to "Receipts." In the "Adjustments to Income" section, the taxpayer substituted the entry "Non-taxable receipts" for the official entry he had masked. While the taxpayer reported the amount of his wages on the proper line of Form 1040, he deducted an equal amount on the line he titled "Non-taxable receipts," thus resulting in a reported Adjusted Gross Income of zero. The taxpayer attached a statement to the altered Form 1040 protesting the income tax laws.

The Service imposed the failure to file penalty of section 6651(a)(1) on the taxpayer, contending that the document filed by the taxpayer did not constitute an "income tax return" within the meaning of sections 6012, 6072, and 6651(a)(1) of the Code. The Tax Court agreed with the Service's determination, focusing on the "honest and reasonable attempt to satisfy the requirements of the tax law" prong of the substantial compliance standard:

The tampered form before us may purport to be a return in that it may "convey, imply or profess outwardly" to be a return. Black's Law Dictionary 1112 (rev. 5th ed. 1979). It was also sworn to. But it does not reflect an endeavor to satisfy the law. It in fact makes a mockery of the requirements for a tax return, both as to form and content The tampered form here is a conspicuous protest against the payment of tax, intended to deceive respondent's return-processing personnel into refunding the withheld tax. Since such intentional tampering could go undetected in computer processing, respondent was forced to develop

TL-N-4417-00

and institute special procedures for handling such submissions. The critical requirement that there must be an honest and reasonable attempt to satisfy the requirements of the Federal income tax law clearly is not met.

Beard at 778,779.

In its conclusion, the court cited the following statement of the Court of Appeals for the Seventh Circuit:

In the tax protestor cases, it is obvious that there is no “honest and genuine” attempt to meet the requirements of the Code. In our self-reporting tax system the government should not be forced to accept as a return a document which plainly is not intended to give the required information. [United States v. Moore, 627 F.2d 830, 835 (7th Cir. 1980).]

Beard at 779.

Moore is one of a line of cases involving so-called “tax protestor” returns. The tax protestor cases typically involve Forms 1040 on which the taxpayer failed to report anything more than de minimis amounts of income and attached extensive Constitutional objections and other tax protest materials.

In the “tax protestor” cases, the courts generally conclude that the documents contain insufficient information about the taxpayer’s income to permit the Service to compute the tax, and that the extent of the tax protestor arguments indicates a lack of an honest and reasonable attempt to comply with the law. U.S. v. Porth 426 F.2d 519 (10th Cir. 1970) (no valid return where taxpayer’s Form 1040 was devoid of income information and contained cites to the Constitution purportedly supporting taxpayer’s refusal to complete the form); Thompson v. Commissioner, 78 T.C. 558 (1982) (no valid return where the Form 1040 contained only de minimis income information and was circumscribed with constitutional objections); Sochia v. Commissioner, T.C. Memo 1998-294, (no valid return where the taxpayers provided some income information, but wrote “object -- 5th Amend.” on every line of the form).

Apart from the so-called “tax protestor” cases, there is little authority for determining what constitutes an honest and reasonable attempt to satisfy the requirements of the law. In fact, courts have been reluctant to declare defective or incomplete returns as nullities in the absence of protestor language or a refusal by the taxpayer to provide the required information. Cases such as Badaracco, *supra*, Steines v. Commissioner, T.C. Memo. 1991-588, Nicolaisen v. Commissioner, T.C. Memo. 1985-120, and Blount v. Commissioner, 86 T.C. 383, acq. in result, 1986-2 C.B. 1, are typical.

TL-N-4417-00

In Badaracco, the taxpayer filed returns that were fraudulent, but which contained no tax protestor arguments or alterations to the official return form. Despite the fraudulent nature of the returns, the Supreme Court declared them valid for purposes of starting the period of limitations, noting that “[a]lthough those returns, in fact, were not honest, the holding in Zellerbach does not render them nullities.” Badaracco at 397.¹

In Steines, the taxpayer reported the full amount of his wages (\$41,000) on the proper line of an unaltered Form 1040, but also attached an official Schedule C reporting a bogus business loss of \$100,000,000,000, thus purportedly eliminating any tax liability. Except for the large loss claimed on Schedule C, the return appeared normal in every way. The court noted that the Schedule C was completely frivolous and that, with respect to the Schedule C, the taxpayer did not make an honest and reasonable attempt to satisfy the requirements of the tax law. However, as to the return in general, the court distinguished Moore, noting that the return here did not contain “frivolous Fifth Amendment or other frivolous Constitutional and legal claims” The court indicated that while the taxpayer’s return was patently frivolous in part, such return could be audited and the proper tax liability could be readily determined.

In Nicolaisen, the taxpayer received wages for the two years at issue of \$19,512 and \$8,427, respectively. The taxpayer filed Forms 1040 with the word “none” written in the lines for wages, interest, and dividends. The taxpayer attached Schedule A reflecting a \$91,000 charitable contribution deduction for contributions to a church. The taxpayer also attached his Forms W-2, an Ordination Certificate from the church attesting to the fact that the taxpayer was a minister for the church, and a receipt from the church for a \$91,000 contribution. The Service argued that a valid return did not exist, but the court disagreed, noting that the returns were not “protest-type returns setting forth numerous constitutional objections.”

In Blount, the taxpayer filed an otherwise complete official Form 1040 but did not attach Form W-2, as required by section 1.6011-1(a) of the regulations and the instructions to Form 1040. The Service argued that it should be entitled to treat the return as a nullity, in part because a taxpayer’s failure to attach a required form interferes with the efficient operation of the tax collection system. While the Tax Court agreed that the task of processing tax returns is made more difficult by failure of taxpayers to attach the required forms, it concluded that the return met the substantial compliance standard and therefore constituted a valid return.²

¹ See also U.S. v. Moore, 627 F.2d 830, 835, contrasting “tax protestor” returns with returns claiming fraudulent deductions from income: “[i]t is not the false data which makes [tax protestor] returns defective, but the fact that there is no real attempt to comply with the requirement of filing a return.”

² In a Significant Service Center Advice dated January 12, 2000, the Office of Chief Counsel concluded that an otherwise complete individual income tax return filed without a required form or schedule constitutes a valid return for purposes of the statute of limitations on assessment.

TL-N-4417-00

We think it is a close question whether a Form 1040 on which the taxpayer altered lines to claim unallowable deductions constitutes a valid return. Virtually all of the authority for treating a signed Form 1040 as a nullity relies upon the fact that the taxpayer refused to provide any information pertaining to his or her income, or provided de minimis income information and accompanied the purported return with tax protestor type arguments. While the altered Form 1040 in Beard was held not to constitute a valid return, the taxpayer there did more than simply alter the official lines on the form. The taxpayer attached information making what the court characterized as “frivolous contentions” (i.e., that wages do not constitute “gross income”). Taking into account all of the information contained in the taxpayer’s purported return, the court concluded that the requirement that there be an honest and reasonable attempt to meet the requirements of the law were not met.

We think that the Service may properly treat returns such as those in Beard as nullities, and advise the taxpayer that he or she has failed to file a return.³ However, we are reluctant to conclude that any alteration of Form 1040 would render an otherwise valid return a nullity, particularly if the alteration is relatively insignificant and the inaccurately reported tax liability could be easily corrected by the Service through the use of audit procedures. We think that a reviewing court might disagree with the Service’s treatment of an altered return as a nullity where the taxpayer alters the form to reduce, but not eliminate, tax liability based on an unallowable deduction, and the Form 1040 is devoid of other evidence that the taxpayer objects to the income tax laws. In such an instance, we are concerned that the statute of limitations on assessment might expire without an assessment of tax shown on the return.

We think the more prudent approach would be for the Service to make the decision whether to treat an altered form as a valid return or a nullity on a case-by-case basis, after considering all of the information contained on the form and attached thereto, and after consulting with Area Counsel, if necessary.⁴ In cases where the Service decides to treat the altered Form 1040 as a valid return, the Service should immediately initiate audit procedures to disallow the unallowable deduction.

Altered Jurats

³ Our advice is not intended to suggest that the Service characterize particular taxpayers as “tax protestors.” In fact, section 3707(a) of the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685 (1998) prohibits the Service from designating taxpayers as “illegal tax protestors,” or by any similar designation.

⁴ We think this approach is consistent with the Service’s current practice. See Internal Revenue Manual section 3.11.3.7.1.4, directing returns processing personnel to route to Examination Division any form that has been altered by the taxpayer.

TL-N-4417-00

The preprinted jurat on Form 1040 reads: "Under penalties of perjury, I declare that I have examined this return and accompanying schedules and statements, and to the best of my knowledge and belief, they are true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge."

You question whether the Service may treat as nullities Forms 1040 on which the taxpayer has obliterated or added language to the jurat. You note that previous advice from our office on this issue has analyzed the specific alterations to the jurat in an effort to determine whether the taxpayer properly signed the return under penalties of perjury. You question whether the Service may apply a bright line test that any alteration to the jurat of the official Form 1040 renders the document a nullity.

We cannot conclude that the Service may treat a document as a nullity solely because the taxpayer's obliteration or addition to the jurat altered the official tax form. Rather, we conclude that the proper analysis is whether the obliteration or additions to the jurat cause the return to fail the requirement that returns be signed under penalties of perjury (i.e., the fourth prong of the Beard substantial compliance standard). See e.g., Williams v. Commissioner, 114 T.C. 136 (2000).

Where the taxpayer strikes or obliterates the jurat, the law is clear that the Form 1040, even if otherwise complete, accurate, and signed, does not constitute a valid return, because it is not signed under penalties of perjury. Cupp v. Commissioner, 65 T.C. 68 (1975); United States v. Moore, 627 F.2d 830 (7th Cir. 1980); Hettig v. United States, 845 F.2d 794 (8th Cir. 1988).

Where the taxpayer does not strike or obliterate the jurat, but adds language to the jurat, courts tend to examine the nature of the additions. Where the addition is found to negate, or at least cast doubt on, the validity of the jurat, courts have concluded that the Form 1040 is not signed under penalties of perjury and is therefore not a valid return. See e.g., Sloan v. Commissioner, 53 F.3d 799 (7th Cir. 1995) (the taxpayers wrote in the jurat box above their signatures "Denial & Disclaimer attached as part of this form" and the court found that the attachment cast doubt on the veracity of the return); Williams v. Commissioner, *supra*. (taxpayer's attached "disclaimer," although outside of the jurat box, negated the meaning of the jurat); Letscher v. United States, 2000 U.S. Dist. LEXIS 13061, 2000-2 U.S. Tax Cas. (CCH) P50,723 (taxpayer's addition of "Without prejudice, See attachment dated 4/13/96" above his signature in the jurat box invalidated the return because the referenced attachment called into question the truthfulness and accuracy of his return).

On the other hand, where the addition does not negate or cast doubt on the validity of the jurat, courts have tended to treat the Form 1040 as a valid return. See e.g., McCormick v. Peterson, 1993 U.S. Dist. LEXIS 17561, 94-1 U.S. Tax Cas. (CCH)

TL-N-4417-00

P50,026 (1993), acq. 1993-1 C.B. 5 (the words “under protest” added by the taxpayer beneath his signature did not alter the meaning of the jurat).

Because of the various additions taxpayers make to the Form 1040 jurat, it is difficult to provide a bright line test for determining the validity of returns with additions to the jurat. However, we can provide a bright line test in cases where the taxpayer strikes portions of the preprinted Form 1040 jurat, or substitutes his or her own language in place of the preprinted jurat. In these cases, the Service may treat the document as a nullity. See Hettig, supra. (taxpayer crossed out the “under penalties of perjury” language from the beginning of the jurat); Jenkins v. Commissioner, T.C. Memo. 1989-617 (taxpayer substituted her own language in place of the “true, correct, and complete” language of the preprinted jurat).⁵

Where the Service treats a Form 1040 as a nullity because the jurat was obliterated, the Service should advise the taxpayer that he or she has failed to file a valid income tax return, and give the taxpayer the opportunity to perfect the Form 1040 by signing an official jurat. We recommend that the Service retain the Form 1040 filed by the taxpayer for use in determining the taxpayer’s liability in the event the taxpayer never perfects the filed Form 1040.

In cases where the Service’s processing personnel are uncertain whether a taxpayer’s addition negates or casts doubt on the jurat, we suggest the processing personnel seek the advice of Area Counsel. Area Counsel should feel free to consult with the Office of Associate Chief Counsel (Procedure and Administration) if necessary.

ISSUE 2

As indicated in Beard, a document is a valid return if: (1) there is sufficient data to calculate the tax liability; (2) the document purports to be a return; (3) there is an honest and reasonable attempt to satisfy the requirements of the tax law; and (4) the taxpayer executes the return under penalties of perjury.

A taxpayer’s homemade income tax form that complies with the above requirements constitutes a valid return. Unfortunately, because of the variety of documents that might be submitted by taxpayers, it is impractical to attempt to provide a specific bright line test for determining when a particular homemade income tax form constitutes a

⁵ See also our October 25, 1999 memorandum (cited in your request) holding that an otherwise complete return was not valid where the taxpayer substituted in place of the preprinted jurat the following language: “I am responsible for the truthfulness and accuracy of the information in this return.”

TL-N-4417-00

valid return. However, we think the proper approach for processing homemade income tax forms is the approach provided by section 1.6011-1(b) of the regulations.

We think section 1.6011-1(b) of the regulations requires the Service to analyze a homemade income tax form to determine whether it includes amounts of gross income or claimed deductions. If so, the Service should accept the document as a tentative return and correspond with the taxpayer for a return properly made on Form 1040.⁶ If the taxpayer subsequently perfects the homemade income tax form with a return properly made on Form 1040, the Service should accept the Form 1040 as a return filed as of the date the homemade return was filed. If the taxpayer does not perfect the homemade income tax form within a reasonable period of time, the Service should assess the tax shown on the tentative return and immediately initiate audit procedures to ensure that any deficiency is assessed within the period of limitations.

On the other hand, if the homemade income tax form does not include amounts of gross income or claimed deductions, but simply protests the tax laws, the Service should consider the homemade form a nullity and advise the taxpayer that he or she has failed to file a return.⁷

We think this is a reasonable approach toward processing homemade income tax forms. We suggest that, if necessary, the Submission Processing Center seek the assistance of Area Counsel in determining whether to treat a homemade income tax form as a valid return.

ISSUE 3

Section 6611(a) of the Code provides that interest shall be allowed and paid upon any overpayment in respect of any internal revenue tax at the overpayment rate established under section 6621.

Section 6611(b)(3) provides that in the case of a return filed after the last date prescribed for filing the return (determined with regard to extensions), no interest shall be allowed or paid for any day before the date on which the return is filed.

⁶ You ask whether the fact that Form W-2 is attached to the homemade income tax form is relevant. We think that a Form W-2 should be considered evidence of the taxpayer's intent to comply with the requirement to file a return, but we note that the absence of Form W-2 does not render an otherwise valid return a nullity. See Blount, supra.

⁷ For this purpose, a Form 1040 completed with all "zeros" should be treated as a return. Because courts have differed on the question of whether a "zero return" is a valid return, the Service has chosen the conservative approach of treating zero returns as valid returns. See Significant Service Center Advice to the Brooklyn District dated June 16, 2000.

TL-N-4417-00

Section 6611(e)(1) provides that if any overpayment of tax is refunded within 45 days after the last day prescribed for filing the return of such tax (determined without regard to any extension of time for filing the return) or, in the case of a return filed after such last date, is refunded within 45 days after the date the return is filed, no interest shall be allowed under section 6611(a) on such overpayment.

Section 6611(g) of the Code provides that for purposes of sections 6611(b)(3) and 6611(e), a return shall not be treated as filed until it is filed in processible form. Under the statute, a return is in processible form if: (1) it is filed on a permitted form; and (2) it contains the taxpayer's name, address, identifying number, the required signature, and sufficient required information (whether on the return or on required attachments) to permit the mathematical verification of tax liability shown on the return.

The Court of Appeals for the Federal Circuit has described the mathematical verification test as follows:

Mathematical verifiability requires sufficient information to permit IRS to recalculate and corroborate the mathematics and data reported by the taxpayer. Thus, under section 6611, a taxpayer must submit, in good faith, all the required forms with the required signatures and enough underlying data for IRS to verify the tax liability shown on the return. The information must be sufficient to enable IRS to calculate the tax liability without undue burden.

The Columbia Gas System, Inc. v. United States, 70 F. 3d 1244, 1246 (Fed. Cir. 1995). The test for determining whether a return is processible is more strict than the test for determining whether a document is a valid return (i.e., the substantial compliance test). Even if an altered Form 1040 or a homemade income tax form constitutes a valid income tax return, we agree with your conclusion that such return does not constitute a processible return within the meaning of section 6611(g). The statute specifically provides that the return must be filed on a permitted form to be considered processible. We do not think Congress contemplated a Form 1040 on which the line titles or jurat were altered as a "permitted form."

Further, as indicated by the court in Columbia Gas System, the information must be sufficient to enable the Service to calculate the tax liability without undue burden. In our opinion, given the Service's automated process for calculating tax liability, requiring the Service to calculate the tax liability based on information contained on an altered Form 1040 or homemade income tax form constitutes undue burden and renders the return unprocessable for purposes of section 6611(g).

ISSUE 4

Frivolous Return Penalty: In General

TL-N-4417-00

Section 6702 of the Code imposes a \$500 penalty on any individual who files what purports to be a return of tax imposed by Subtitle A of the Code, but which (1) does not contain information on which the substantial correctness of self-assessment may be judged or (2) contains information that on its face indicates that the self-assessment is substantially incorrect. For the penalty to apply, the individual's conduct must be due to (1) a position which is frivolous, or (2) a desire (which appears on the purported return) to delay or impede the administration of Federal income tax laws. The penalty is not based on tax liability. There is no requirement of an underpayment or understatement of tax in order for the penalty to be imposed. Liability arises immediately with the filing of the frivolous return.

This penalty is in addition to any other penalty provided by law. Section 6702 applies to both original returns and claims for refund filed on amended returns. See Sisemore v. United States, 797 F.2d 268 (6th Cir. 1986), cert. denied, 479 U.S. 849 (1986).

Section 6702 of the Code was enacted by the Tax Equity and Fiscal Responsibility Act of 1982, P.L. 97-248, 96 Stat. 324. According to the Senate Report, S. Rep. No. 97-494, Vol. 1, 97th Cong., 2d. Sess. 277 (1982), the penalty is intended to attack a variety of tax protest activities including: (1) irregular forms 1040 not in processible form because of altered or incorrect descriptions of line items or other provisions; (2) references to spurious constitutional arguments instead of required completion of a tax form; (3) forms on which there is incomplete information to calculate tax liability; (4) presentation of information which is clearly inconsistent, such as the listing of only a few dependents by a person who claims 99 exemptions; (5) "gold standard " or "war tax" deductions; and (6) deliberate use of incorrect tax tables.

Section 6702 of the Code provides that to be subject to the frivolous return penalty an individual needs to file what purports to be a tax return. However, section 6702 requires only that the documents filed "purport" to be a return, not that the documents must be a valid return. Holker v. United States, 737 F.2d 751, 752 (8th Cir. 1984) (In a letter to the IRS, taxpayer requested a tax refund arguing that he did not owe any tax because he was a "natural individual and unenfranchised freeman". He enclosed with the letter various documents, including an unsigned Form 1040 marked "NOT A TAX RETURN—for information only "and two W-2 forms marked "INCORRECT". The court construed the documents as elements of a purported return) See e.g., Davis v. United States, 742 F.2d 171,173 (5th Cir. 1984) (Taxpayers filed a Form 1040 reporting zero income but their attached W-2's showed \$60,000 of income. The court held that the Form 1040 on its face indicates that the self-assessment was substantially incorrect).

A taxpayer must claim a credit or a refund on the appropriate income tax return under section 301.6402-3(a)(1) of the Regulations on Procedure and Administration. Therefore, any forms or documents filed by the taxpayer in pursuit of a claim of refund should be construed as a purported return for purposes of section 6702 of the Code. These documents would include altered tax forms or unauthorized tax forms. See Olson v. United States, 760 F.2d 1003 (9th Cir. 1985) (Taxpayer filed an unsigned Form

TL-N-4417-00

1040 on which he listed his wages as zero and cautioned that it was not a return. He asserted that he filed the Form 1040 only to obtain a refund and not with the intent to file a return. The court held that because a taxpayer may not obtain a refund without first filing a return, the form filed by the taxpayer should be construed to be a purported return). As the courts above have noted, it is the conduct of filing incomplete tax forms that section 6702 was determined to punish and deter so excluding such documents from the definition of purported return would be inconsistent with that goal.

Unauthorized or altered forms and attempts to obtain a claim for refund using those forms are clearly contemplated in the Code and the Senate Report. The determination of whether a taxpayer's purported return is subject to the frivolous return penalty must be determined on a case by case basis. Each case must be reviewed on its own facts. There is no automatic or "bright line" test for determining if the frivolous return penalty applies.

Frivolous Return Penalty - Altered Jurats

Case law in this area suggests that if the jurat is altered then a determination must be made on whether the alteration has changed the meaning of the jurat. If it has not, the statement may be an exercise of free speech or an insignificant addition and therefore not subject to section 6702 of the Code. However, if it does change the meaning of the jurat, the frivolous return penalty may apply. 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. Most courts have held that the statutory duty to file a tax return outweighs the small infringement, if any, on a taxpayers first amendment right to protest. For example, a tax return that is not sworn under penalties of perjury does not contain the requisite information to determine the correctness of the return. See Mosher v. Internal Revenue Service, 775 F.2d 1292 (5th Cir. 1985) cert. denied, 475 U.S. 1123 (1986), (Taxpayer filled out Form 1040 but crossed out the penalty of perjury language and inserted beneath the stricken jurat the typewritten words "Violates Amend. V, U.S. Constitution"). In addition, changes to portions of the jurat invalidate an otherwise accurate return. Hettig v. United States, 845 F.2d. 795 (8th Cir.1988) (Taxpayer crossed out the "under penalties of perjury" language from the beginning of the jurat). Additions to the jurat may also invalidate the Form 1040 as a return. Sloan v. Commissioner, 102 T.C.137, 144 (1994), aff'd. 53 F.3d 799 (7th Cir. 1995), cert. denied, 516 U.S. 897 (1995) (The taxpayers wrote in the jurat box above their signatures "Denial & Disclaimer attached as part of this form" and the court found that the attachment cast doubt on the veracity of the return. In Letscher v. United States, 2000 U.S. Dist. LEXIS 13061, 2000-2 U.S. Tax Cas. (CCH) P50,723, taxpayer's addition of "Without prejudice, See attachment dated 4/13/96" above his signature in the jurat box invalidated the return because the referenced attachment called into question the truthfulness and accuracy of his return.

TL-N-4417-00

On the other hand, most courts have acknowledged those additions asserting constitutionally protected rights without negating the penalties of perjury statement. Adding protest language to the jurat does not invalidate the jurat where taxpayer provided a complete and accurate return. Todd v. United States, 849 F.2d 365 (9th Circuit 1988) (Under the jurat, taxpayer wrote “signed involuntarily under penalty of statutory punishment.”). Protest language is acceptable if taxpayer also satisfies the statutory obligation to file a return. Where the addition does not negate or cast doubt on the validity of the jurat, courts have tended to treat the Form 1040 as a valid return. McCormick v. Peterson, 1993 U.S. Dist. LEXIS 17561, 94-1 U.S. Tax Cas. (CCH) P50,026 (1993), acq. 1993-1 C.B. 5. (The words “under protest” added by the taxpayer beneath his signature did not alter the meaning of the jurat).

The determination of whether a taxpayer is subject to the frivolous return penalty because the taxpayer has altered the meaning of the jurat must be determined on a case by case basis. Each case must be reviewed on its own facts. There is no automatic or “bright line” test for determining if the frivolous return penalty applies.

We hope this information is helpful. We recognize the need for processing personnel to have clear rules in these situations. If you think it would be helpful, we would be willing to design a training course to assist processing personnel in determining whether an altered document is a valid return or a nullities. Please feel free to contact Andrew J. Keyso at (202) 622-4910 for further assistance with Issues 1, 2, or 3 of this memorandum. If you need further assistance with Issue 4 please contact Ann M. Kramer at (202) 622-4940.