Department of the Treasury	Internal Revenue Service	Office of Chief Counsel	Notice

CC-2003-019

June 12, 2003

Subject: Change in Litigating Position Application of Addition to Tax Under Section 6651(a)(2) on Section 6020(b) Returns

Cancellation Date: Upon incorporation into the CCDM

Purpose

This notice announces a change in the Service's litigating position concerning the application of the section 6651(a)(2) addition to tax for returns prepared under section 6020(b). This Notice supersedes Notices N(35)001-047 (October 16, 2001) and N(35)000-169 (November 16, 1999).

Background

Section 6651(a)(2) authorizes the imposition of an addition to tax where, without reasonable cause, a taxpayer fails to pay the amount shown as tax on a return on or before the payment due date. Prior to the enactment of section 6651(g), no comparable failure to pay penalty applied to taxpayers who did not file a return. Recognizing the inequity of imposing the failure to pay penalty on filers but not on nonfilers, Congress enacted section 6651(g). Section 6651(g)(2) provides that, for returns due after July 30, 1996, a section 6020(b) return will be treated as a return filed by the taxpayer for purposes of determining the section 6651(a)(2) addition to tax. See Taxpayer Bill of Rights 2, Pub. L. 104-168, § 1301(a), 110 Stat. 1452 (July 30, 1996).

Section 6020(b)(1) authorizes the Secretary to make a return upon either a taxpayer's failure to file a return or upon a taxpayer's filing of a fraudulent return. In the context of taxes subject to deficiency procedures, Notices N(35)001-047 (October 16, 2001) and N(35)000-169 (November 16, 1999) provided guidance on what constitutes a section 6020(b) return to which the section 6651(a)(2) addition to tax will apply. Specifically,

Filing Instructions: Binder____Master Sets: NO X RO X
NO: Circulate___Distribute_X_to: All Personnel___Attorneys__In: all divisions
RO: Circulate___Distribute_X_to: All Personnel___Attorneys__In: all divisions
Other National FOIA Reading Rooms
Electronic Filename: Sec 6020.pdf Original signed copy in: CC:F&M:PM:P

Notice N(35)000-169 stated that a section 6020(b) return may consist of several documents, which, together, provide taxpayer identifying information, sufficient data to compute liability, and a signature from the Secretary or his delegate. This analysis was based in part on Millsap v. Commissioner, 91 T.C. 926 (1988), acq. in result in part, 1991-2 C.B.1. In Millsap, the Tax Court held that a dummy return consisting of taxpayer identifiers and a signed revenue agent's report, which together were submitted through a Service Center processing pipeline, constituted a valid section 6020(b) return.

In two recent cases, the Tax Court refined its analysis of what constitutes a return under section 6020(b) for purposes of the addition to tax under section 6651(a)(2). See Cabirac v. Commissioner, 120 T.C. No. 10 (April 22, 2003), and Spurlock v. Commissioner, T.C. Memo. 2003-124. In Spurlock, the Tax Court held that a return for section 6020(b) purposes must be "subscribed, it must contain sufficient information from which to compute the taxpayer's tax liability, and the return form and any attachments must purport to be a 'return'." Spurlock, slip. op. at 27. In Cabirac, the documents the Service proffered as constituting a section 6020(b) return were (a) dummy Forms 1040 that identified the taxpayer, but which were not signed and did not show any tax due, (b) a subsequently prepared 30-day letter, and (c) a revenue agent's report attached to the 30-day letter explaining how the Service computed the taxpayer's liability. Applying the analysis later explained in Spurlock, the Tax Court held that these documents did not constitute a section 6020(b) return. Critical to the Tax Court's analysis was that the Service never treated the documents, which the Service created at various times, as one group purporting to be a return.

Change in Position

Pending further guidance, the Office of Chief Counsel will concede the section 6651(a)(2) addition to tax in cases with facts that do not closely parallel those described in Millsap. Accordingly, we will concede cases where the Service has not processed, as a return, documents that 1) identify the taxpayer, 2) provide a basis for the taxpayer's tax computation, and 3) are signed by a Service employee delegated the authority to sign section 6020(b) returns. The Office of Chief Counsel is considering publishing guidance that will clarify what is necessary to constitute a section 6020(b) return. In the interim, the existence of documents comprising a portion of a taxpayer's administrative file created in the Substitute for Return ("SFR") or Automated Substitute for Return ("ASFR") process will not alone establish a section 6020(b) return.

When conceding the section 6651(a)(2) addition to tax, Chief Counsel attorneys should seek to increase the section 6651(a)(1) addition to tax. Ordinarily, the amount of the failure to file addition to tax is 5 percent of the amount required to be shown as tax if the failure is for not more than one month, with an additional 5 percent for each additional month or fraction thereof during which such failure continues, for no longer than 5 months. Under section 6651(c)(1), the 5 percent determined under section 6651(a)(1) is reduced

by the amount of the addition to tax under section 6651(a)(2) to 4.5 percent for any month in which both additions are imposed. Therefore, when the section 6651(a)(2) addition is conceded, the failure to file addition to tax should be set at the 5 percent rate per month, instead of the 4.5 percent per month that applied when the Service determined the section 6651(a)(2) addition to tax.

Ordinarily the increase should be alleged in the answer. If the answer has been filed and time to file an amended pleading without leave of court has elapsed, the Chief Counsel attorney should file a motion for leave to file an amended answer or amendment to answer (whichever is applicable) out of time and lodge the amended answer or amendment to answer (whichever is applicable) conceding the section 6651(a)(2) addition to tax, and alleging an increase in the section 6651(a)(1) addition to tax, pursuant to section 6214(a).

If the case is an "S" case, which has not previously been answered, and is returned for trial preparation, a motion for leave to file an answer out of time should be filed. An answer should be lodged with the motion that admits, qualifies, or denies all of the allegations in the petition, and contains a further answering paragraph seeking an increase in the section 6651(a)(1) addition to tax.

In all motions either seeking leave to amend a pleading or to file an answer out of time, petitioner's position with respect to the motion should be stated in accordance with T.C. Rule 50 (a).

Chief Counsel attorneys reviewing statutory notices of deficiency prior to their issuance should ensure that the statutory notice does not determine a section 6651(a)(2) addition to tax on the basis of documents generated in the SFR or ASFR processes on facts similar to those of Cabirac and Spurlock.

Chief Counsel attorneys pursuing settlement should inform the taxpayer (or the taxpayer's representative) of the concession of the section 6651(a)(2) addition to tax and the increase in the section 6651(a)(1) addition to tax. Attached to this Notice is sample language for a decision document for use in regular and "S" cases, conceding the section 6651(a)(2) addition to tax and claiming an increase in the section 6651(a)(1) addition to tax.

For further guidance regarding amended pleadings, the concession of section 6651(a)(2) addition to tax, the imposition of an increase in the section 6651(a)(1) addition to tax and

decision documents to reflect this change in litigating position, please contact Branch 3, Administrative Provisions and Judicial Practice Division at 202-622-7940 or 202-622-7950. If it is believed that the documents in a particular case meet the test set out in Spurlock, please contact Branch 2, Administrative Provisions and Judicial Practice Division at 202-622-4940, to discuss what steps should be taken.

/s/
DEBORAH A. BUTLER
Associate Chief Counsel
(Procedure & Administration)

SECTION 6651(a)(2) IS NOT APPLICABLE; SECTION 6651(a)(1) ADDITION UNDERSTATED

Note: Where it is determined that section 6651(a)(2) addition to tax is not applicable, the section 6651(a)(1) addition to tax will have been understated by 0.5% for five months and you will need to seek an increased section 6651(a)(1) addition to tax. Because the addition only runs for five months, you will be able to determine an exact amount. The following should be used:

DECISION

Pursuant to agreement of the parties in this case, it is

ORDERED AND DECIDED: That there is a deficiency in income tax due from the petitioner for the taxable year ____ in the amount $_____;

That there is no addition to tax due from the petitioner under I.R.C. § 6651(a)(2) for the taxable year ____;.and

That there is an addition to tax due from petitioner under I.R.C. § 6651(a)(1) for the taxable year ____ in the amount of $_____.

Judge.

Entered:

* * * * *

It is further stipulated that the respondent claims an increased addition to tax for the taxable year _____ in the amount of $_____, under the provisions of I.R.C. § 6651(a)(1), pursuant to the provisions of I.R.C. § 6214(a).

Thus, the total amount of the addition to tax due from petitioner under I.R.C. § 6651(a)(1) for the taxable year _____is $_____.

It is further stipulated that, effective upon the entry of the decision by the Court, petitioner waives the restriction contained in I.R.C. § 6213(a) prohibiting assessment and collection of the addition to tax (plus statutory interest) until the decision of the Tax Court has become final.