OFFICE OF
CHIEF COUNSEL

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224
February 7, 2001

Number: **200113026**
Release Date: 3/30/2001

UIL 09.20.02-00
9999.98-00
GL-100623-01
CC:PA:CBS:Br2

MEMORANDUM FOR KEITH FOGG, ASSOCIATE AREA COUNSEL (SB/SE)

FROM: Kathryn A. Zuba, Chief, Branch 2 (Collection, Bankruptcy & Summonses)

SUBJECT: Exceptions to Discharges and Section 6020 Returns

This memorandum responds to your November 9, 2000, request for advice on the extent to which the B.C. § 523(a)(1)(B) exception to discharge for taxes applies to taxes which are based on substitutes for returns (SFRs) prepared by the Service pursuant to I.R.C. § 6020. This document is not to be cited as precedent.

Issue Presented

Does the B.C. § 523(a)(1)(B) exception to discharge for taxes apply to taxes which are based on substitutes for returns (SFRs) prepared by the Service pursuant to I.R.C. § 6020 where the taxpayer signs either a Form 870 or a Form 4549?

Brief Answer

Yes. An executed Form 870, Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment, or Form 4549, Income Tax Audit Changes, when accompanied by the schedules prepared by the Revenue Officer, is a return as described in section 6020(a). Such returns are "returns" within the meaning of B.C. § 523(a)(1)(B).

Background

This question arises in the following typical scenario. A taxpayer fails to file a return for a given tax period and a Revenue Officer is assigned to secure the return. When the taxpayer does not provide the information necessary to compute the taxes due, if any, the Revenue Officer has to prepare the return using information from sources other than the taxpayer. The taxpayer then agrees to immediate assessment and collection of the taxes shown on the return prepared by the Revenue Officer and signs either the Form 870 or 4549. Later, the taxpayer files bankruptcy and seeks a discharge of the tax.

Analysis

B.C. § 523(a)(1)(B) excepts from discharge taxes "with respect to which a return...was not filed." The word “return” as used in B.C. § 523(a)(1)(B) means, at the very least, “those documents that would qualify as returns under the Internal Revenue Code.” In re Hindenlang, 164 F.3d 1029, 1035 (6th Cir. 1999). If the taxpayer has filed a return under the tax laws, then the debtor has filed a return for discharge purposes. See, e.g., In re Mathis, 87 AFTR2d Par. 2001-474 (S.D. Fla. 2001); In re Villalon, 2000 Bankr. LEXIS 1108 (Bankr. N.D. Ohio 2000); In re Wright, 244 B.R. 451 (Bankr. N.D. Cal. 2000); In re Berard, 181 B.R. 653 (Bankr. M.D. Fla. 1995).

The Internal Revenue Code does not formally define “return.” Generally, taxpayers file returns on pre-printed forms, such as the Form 1040, and sign a *jurat* clause that subjects the taxpayer to penalties of perjury for false statements. For these situations the Tax Court has developed the following four-part test to decide whether a given document is a “return”: (1) it purports to be a return; (2) it is signed by the taxpayer under penalty of perjury; (3) it discloses data from which the tax can be computed; and (4) it represents an honest and reasonable attempt to satisfy the requirements of the tax law. Beard v. Comm’r, 82 T.C. 766 (1984), aff’d 793 F.2d 139 (6th Cir. 1986)(harmonizing Germantown Trust v. C.I.R., 309 U.S. 304 (1940) with Zellerbach Paper Co. v. Helvering, 293 U.S. 172 (1934). Thus, a Form 1040 filed for a tax which has already been assessed is not a return under the Tax Court test because the document serves no tax administration purpose and therefore cannot represent an honest and reasonable attempt to satisfy the requirements of the tax law. In re Hindenlang, supra, at 1034 (“a Form 1040 is not a return if it no longer serves any tax purpose or has any effect under the Internal Revenue Code. A purported return filed too late to have any effect at all under the Internal Revenue Code cannot constitute an honest and reasonable attempt to satisfy the requirements of the tax law.”)(internal quotation marks omitted).

When the taxpayer does not file a valid return, I.R.C. § 6020 authorizes the Service to prepare a substitute for the return in order to assess the tax and distinguishes between two types of Substitutes For Returns (SFRs). Under 6020(a) the Service prepares the SFR based on the taxpayer's "consent to disclose all information necessary for the preparation thereof" and the taxpayer signs it. Under 6020(b) the Service prepares the SFR without the taxpayer's consent or acknowledgment.

Section 6020(a) SFRs are "returns" for discharge purposes while section 6020(b) SFRs are not. See, e.g., Bergstrom v. United States, 949 F.2d 341 (9th Cir. 1991); In re Mathis, 87 AFTR2d Par. 2001-474 (S.D. Fla. 2001). Revenue Ruling 74-203 holds that a Form 870, Form 1902E, or Form 4549 signed by the taxpayer in response to a proposed SFR is a return of the taxpayer for purposes of section 6020(a). Under the facts of that revenue ruling, a husband and wife voluntarily provided their books and records, from which information a revenue agent

computed their liability, put it all on schedules that were attached to a Form 870 ("Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overasessment"). The revenue ruling concludes, relying on United States v. Olgeirson, 284 F. Supp. (D.N.J. 1968), that "the executed Form 870 with accompanying schedules is a return under section 6020(a) of the Code."

The revenue ruling and case law lead us to conclude that a signed 870 with accompanying schedules is a "return" within the meaning of Bankruptcy Code section 523(a)(1)(B) in determining dischargeability. Although Rev. Rule 74-203 is based on a fact pattern where the taxpayer voluntarily provided the information, case law such as Olgeirson, id., does not indicate that the source of the information used to prepare the SFR is determinative of whether the SFR constitutes a return. We conclude that the source of the information used to prepare the return was not relevant to the revenue ruling's holding that a Form 870 constitutes a section 6020(a) return where it is signed by the taxpayer, lodged with the Service and is accompanied by schedules disclosing the data from which the tax can be computed.

Conclusion

Based on the above, we conclude that the B.R. § 523(a)(1)(B) exception from discharge does not apply when a taxpayer, by signing a Form 870 waiver or like document, allows the Service to immediately assess the amount calculated on a substitute for return prepared by a Service employee and gives up the right to contest the Service's calculation in Tax Court. If, however, the SFR was a section 6020(b) return, the Service should treat the tax as excepted from discharge under B.C. § 523(a)(1)(B).

We hope this adequately addresses your concerns. Please feel free to contact Bryan T. Camp of this office, at 202-622-3620, should you have any further questions.