Department of the Treasury

Internal Revenue Service Office of Chief Counsel

Notice

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September 09, 2004

Litigating Position Regarding the Definition of Returns and Application of Additions to Tax under Section

of Additions to Tax under Section Effective Until 6654 Cancel Date: Further Notice

Subject: 6654 Cancel Date:

## Purpose

This Notice alerts Chief Counsel attorneys to the Service's position as to the definition of a return for purposes of the I.R.C. § 6654 addition to tax, in light of the Tax Court decision in *Mendes v. Commissioner*, 121 T.C. 308 (2003).

## Background

The four part test set forth in *Beard v. Commissioner*, 82 T.C. 766, 777-78, *aff'd*, 793 F.2d 139 (6th Cir. 1986), is widely accepted as the analysis for determining what constitutes a return for purposes of the Internal Revenue Code. For a document to be considered a valid return under *Beard*, the document must: (1) purport to be a return; (2) be executed under penalty of perjury; (3) contain sufficient data to allow calculation of tax; and (4) represent an honest and reasonable attempt to satisfy the requirements of the tax law. *See*, *e.g.*, *In re Hatton*, 220 F.3d 1057, 1060-61 (9<sup>th</sup> Cir. 2000) (*citing Beard*).

Section 6654 provides for an addition to tax in the event of an underpayment of a required installment of individual estimated tax. Each required installment of estimated tax is equal to 25 percent of the required annual payment, which in turn is equal to the lesser of: (1) 90 percent of the tax shown on the individual's return for that year (or, if no return is filed, 90 percent of his or her tax for such year); or (2) if the individual filed a return for the immediately preceding taxable year, 100 percent of the tax shown on that return (or 110% in the case of certain upper income taxpayers). I.R.C. §§ 6654(d)(1)(A), (B)(i), and (ii).

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In Mendes v. Commissioner, 121 T.C. 308 (2003), the Tax Court held that, where a document purporting to be a return is filed more than two years after issuance of a notice of deficiency and 21 months after the filing of a petition, the court will disregard the document and not consider the document a "return" for purposes of section 6654(d)(1)(B)(i). The Tax Court reasoned that "[t]o hold otherwise would, in effect, negate the application of the portion of section 6654(d)(1)(B)(i) that defines the term 'required annual payment' 'if no return is filed' as '90 percent of the tax for. . . [the taxable] year'." The court noted that for "any taxable year for which a taxpayer failed to file a return and received a deficiency notice that included a proposed section 6654 addition to tax, the taxpayer would be able to negate the addition to tax simply by filing a return for that year that showed a tax liability less than the quarterly estimated payments actually made or, if none had been made, that showed a zero tax liability." The court concluded that such a result is inconsistent with both the purpose and function of section 6654(d)(1)(B)(i). The court also reasoned that treating a post notice original return as a return for purposes of section 6654(d)(1)(B)(i) would create a conflict between sections 6655(b)(2) and 6213(a). 121 T.C. at 325.

In its analysis, however, the court failed to apply the *Beard* four part test in determining whether the document filed was a valid return. The concurring opinion by Judge Vasquez, however, applied the *Beard* analysis and found that the document filed by petitioner was not a valid return because it was not an honest and reasonable attempt to satisfy the requirements of the tax law. 121 T. C. at 329-331.

## Position

The Office of Chief Counsel agrees with the result reached in *Mendes*, but believes that the return test set forth in *Beard* is the proper analysis to determine whether the document filed by petitioner was a valid return. Accordingly, pending further guidance, Chief Counsel attorneys should continue to analyze whether a document is a valid return for purposes of section 6654 using the four part analysis set forth in *Beard*. All cases raising an issue directly or indirectly related to the validity of a return for purposes of section 6654 should be coordinated with the Office of the Associate Chief Counsel (Procedure and Administration).

Questions regarding this Notice should be directed to Michael Hara, Tiffany Smith, or Blaise Dusenberry of the Office of Associate Chief Counsel (Procedure and Administration), at (202) 622-4910.

/s/

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