

Office of Chief Counsel
Internal Revenue Service
Memorandum

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date: November 10, 2004

to: Mark H. Howard
Special Litigation Attorney
(Small Business/Self-Employed)

from: Tiffany P. Smith
Assistant to the Branch Chief
(Office of Chief Counsel, Procedure and Administration)

subject: OGD-6702 and Electronic Returns/Altered Period

This Chief Counsel Advice responds to your request for assistance. This advice may not be used or cited as precedent.

ISSUES

- (1) Whether the mailing of Form 8453 with an altered jurat, following the transmission of an electronic return, invalidates the return.
- (2) Will an altered jurat on the Form 8453 affect the validity of the assessment made based on the electronic return?
- (3) What procedures should the Internal Revenue Service (Service) follow when it has identified an electronic return with a subsequent Form 8453 containing an altered jurat?
- (4) Whether an electronic return with an altered jurat on Form 8453 is subject to the frivolous return penalty under section 6702.

(5) What procedures should the Service follow when it has issued an erroneous refund based on an electronic return?

(6) What collection actions are available to the Service if it identifies an erroneous refund soon after transmitting it to the taxpayer's bank account or posting it in the mail?

(7) Whether the Service may refer the preparer of the electronic return and the associated Form 8453 for a civil investigation under section 7408.

CONCLUSIONS

Issue 1

The taxpayer's return fails the requirement that it must be signed under penalties of perjury. Therefore, the return is not valid and can be treated as a nullity.

Issue 2

We have no objections or additional comments concerning this conclusion.

Issue 3

We have no objections to the use of the procedures outlined in your memo, however, we suggest that the Service contact the taxpayer using similar procedures as those outlined in IRM 3.42.5.16.9 relating to missing signatures on the Form 8453.

Issue 4

The return is subject to the frivolous return penalty under section 6702.

Issue 5

We have no objections or additional comments on the use of the procedures you outlined in your memo.

Issue 6

We have no objections to the use of reparation schemes procedures.

Issue 7

We lack essential facts to reach a conclusion that the Service should refer the ERO for investigation under section 7402, 7407, or 7408.

FACTS

The Frivolous Return Program (FRP) at the IRS Campus in Ogden, UT, is receiving Forms 8453 containing altered jurats. Taxpayers submit the Form 8453 to the Service after filing the electronic return. The sample provided contains the following changes to the jurat:

1. the words "Under penalties of perjury" were circled and the word "void" written to the side.
2. above the signature line the words, "I do not release any of my constitutional rights by signing this form" was added.

The taxpayer signed the Form 8453 with the alterations as noted. Based on an informal review of the handwriting, it appears the taxpayer made the changes and alterations on the Form 8453.

LAW AND ANALYSIS

Issue 1: Whether the mailing of Form 8453 with an altered jurat, following transmission of an electronic return, invalidates the return.

Generally, pursuant to section 6011(a), all taxpayers are required to file returns that conform to the forms and regulations prescribed by the Secretary. Under section 1.6012-1(a)(6) of the Treasury Regulations, individual taxpayers must file tax returns on Form 1040. Section 6065 provides that any return shall "contain or be verified by a written declaration that it is made under the penalties of perjury."

To facilitate taxpayers' compliance with the verification requirement of section 6065, the paper Form 1040 contains a jurat. For taxpayers who file their tax returns electronically, the jurat is provided on the *e-form*, which may be signed electronically using a PIN, or on a paper Form 8453, which must be printed, signed, and mailed. The jurat is the portion of the Form 1040 and Form 8453 that 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." See Williams v. Commissioner, 114 T.C. 136 (2000). By signing the jurat included on a Form 1040 or Form 8453, a taxpayer satisfies the requirement that the return is executed under the penalties of perjury. According to the Service procedures, Form 8453 is required for every electronic return, unless it is signed electronically. Moreover, if a taxpayer does not sign his or her return electronically, the return is not considered complete and therefore filed, until the Submission Processing Center receives a complete and signed Form 8453. See IRM 3.42.5.16.

The law for paper returns is well settled that where a taxpayer strikes or obliterates the jurat on a tax return in such a way as to negate the threat of perjury, the jurat is void. See Hettig v. United States, 845 F.2d 794 (8th Cir. 1988), Mosher v. Internal Revenue Service, 775 F.2d 1292 (5th Cir. 1985), cert. denied, 475 U.S. 1123 (1986), United States v. Moore, 627 F.2d 830 (7th Cir. 1980), and Cupp v. Commissioner, 65 T.C. 68 (1975). Where the taxpayer simply adds language or makes alterations to the jurat, however, courts tend to examine the nature and meaning of the additions. If such

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 therefore, not a valid return. See Sloan v. Commissioner, 102 T.C. 137, 146-147 (1994), affd, 53 F.3d 799 (7th Cir. 1995) (writing “Denial & Disclaimer attached as part of this form” above the signature vitiated the jurat because if their return contained a deliberate and material false statement, the Sloans could not be prosecuted for perjury), cert. denied 516 U.S. 897 (1995). But see McCormick v. Peterson, 1993 U.S. Dist. LEXIS 17561, 73 A.F.T.R.2d (RIA) 597 (E.D.N.Y. 1993) (writing “under protest” above the signature line on a jurat, does not invalidate the taxpayer’s return because such addition did not cast doubt on the validity of the jurat).

We believe the above cited cases also apply to electronic returns with altered jurats on the Form 8453. The statutory language is clear; unless otherwise provided by the Secretary, any return or filing required under the Code “shall contain or be verified by a written declaration that it is made under the penalties of perjury.” Section 6065. The option of filing a return electronically has changed the means of filing a tax return; taxpayers can choose to file a return via electronic transmission rather than by mail. This change has not affected the requirement that each return filed must be signed under penalties of perjury. We see no reason for disparate treatment of the signature requirement simply based on the medium of the filing. The Service should treat paper returns with altered jurats and electronic returns with altered jurats on the Form 8453 identically.

In this case, the taxpayer’s electronic return does not meet the requirements of section 6065. The taxpayer made two alterations to the Form 8453. First, the taxpayer wrote “I do not release any of my constitutional rights by signing this form.” Second, the taxpayer circled the words “Under penalties of perjury” and added “void” on the side. The first alteration, by itself, would not cause vitiation of the jurat and invalidation of the return. See McCormick. The second alteration, however, negates the jurat; and thus, the taxpayer’s filing fails the requirement that it must be signed under the penalties of perjury. See Sloan, Williams, and Moore.

A return that fails to meet the requirements of section 6065 also fails the fourth prong of a well established four prong test used to determine a return’s validity, known as the substantial compliance standard. Beard v. Commissioner, 82 T.C. 766, aff’d per curiam, 793 F.2d 139 (6th Cir. 1986). If a return meets each of the four prongs of the substantial compliance standard, the return is valid. Beard. First, the return must provide 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 at 777. Courts have held that where a taxpayer files an otherwise complete, accurate, and signed return with a voided jurat, the return is not valid because the return is not signed under penalties of perjury. See Cupp, Hettig, and Moore.

In this case, the taxpayer's return does not meet the fourth prong of the substantial compliance standard because, as noted above, it was not signed under penalties of perjury. Therefore, the return is invalid and the Service can treat the return as a nullity, whereby, all legal consequences of not filing a return apply.

Issue 2: Will an altered jurat on the Form 8453 affect the validity of the assessment made based on the electronic return?

We have no objections or additional comments concerning your conclusion.

Issue 3: What procedures should the Service follow when it has identified an electronic return with a subsequent Form 8453 containing an altered jurat?

The Service's procedures provide that every electronic return must either be signed electronically using a PIN or by printing, signing, and sending in Form 8453, which contains the jurat identical to the one on the Form 1040. See IRM 3.42.5.16. A number of procedural problems may arise where a taxpayer uses Form 8453 to sign his or her return. For example, there is a time lag between the taxpayer's electronic submission and the Service's receipt of the electronic return, and the Service's receipt of the Form 8453. Usually, the Service receives Form 8453 well after it receives the electronic return. As a result, upon receipt of the electronic return, the Service is unable to verify that the return is executed under the penalties of perjury.

We previously concluded in Issue 1 that the taxpayer's return is invalid. We agree with the action that you advocate, that is, when the Service receives an invalid Form 8453 the Service should abate any assessment made based on the electronic return and then proceed with an audit of the taxpayer for the tax year of the invalid return. Prior to initiating these procedures, we suggest that the Service contact the taxpayer using similar procedures as those outlined in IRM 3.42.5.16.9 relating to missing signatures on the Form 8453.

Issue 4: Whether an electronic return with an altered jurat on Form 8453 is subject to frivolous return penalty under section 6702.

Section 6702 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 for the penalty to be imposed. Liability arises immediately with the filing of the frivolous return.

Section 6702 provides that to be subject to the frivolous return penalty an individual needs to file what purports to be a tax return, but not that the documents be a valid return. See Holker v. United States, 737 F.2d 751, 752 (8th Cir. 1984); Davis v. United States, 742 F.2d 171, 173 (5th Cir. 1984). 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 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 (upholding imposition of frivolous return penalty when the taxpayer crossed out penalty of perjury language and replaced it with “Violates Amend. V, U.S. Constitution”). In addition, changes to portions of the jurat invalidate an otherwise accurate return. See Hettig (imposing frivolous penalty is lawful when the taxpayer crossed out penalty of perjury language). Additions to the jurat may also invalidate the Form 1040 as a return. See Sloan (taxpayers wrote above signature “Denial & Disclaimer attached as part of this form”).

On the other hand, most courts have upheld additions that assert constitutionally protected rights without negating the penalties of perjury statement. Adding protest language to the jurat does not invalidate the jurat where the taxpayer provided a complete and accurate return. See Todd v. United States, 849 F.2d 365 (9th Cir. 1988) (disallowing frivolous penalty when the taxpayer wrote “signed involuntarily under penalty of statutory punishment” under jurat). Protest language is acceptable if the 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 treated the Form 1040 as a valid return. See McCormick (adding the words “under protest” to the jurat does not alter its meaning and frivolous penalty may not be imposed because such expression is protected under the First Amendment). Accordingly, to render a document frivolous for purposes of section 6702, the alterations to the jurat must reasonably cast doubt on the validity of the jurat and be more than a mere expression of a grievance.

In this case, the taxpayer added the word “void” to the perjury statement and claimed that he did not release any Constitutional rights by signing the Form 8453. The tax return is not sworn under penalties of perjury because the taxpayer voided the perjury statement. Thus, the return does not contain the requisite information to determine its correctness and is subject to the frivolous return penalty.

Issue 5: What procedures should the Service follow when it has issued an erroneous refund based on an electronic return?

We have no objections or additional comments on the use of the procedures you outlined in your memo.

Issue 6: What collection actions are available to the Service if it identifies an erroneous refund soon after transmitting it to the taxpayer's bank account or posting it in the mail?

You point out that the Service may send out a refund before it receives Form 8453. When this happens, an issue arises as to what procedures the Service should follow when a potentially erroneous refund has been issued. You propose to use the same procedures as the Office of Chief Counsel adopted for the use in connection with the reparations schemes.

We understand these procedures to consist of: directing Financial Management Services (FMS) to stop issuance of the check or electronic funds transfer before they leave the FMS; seeking return of the envelope containing the check from the United States Postal Service prior to its delivery; placing a stop payment on the electronic refunds transfer or check; requesting voluntary repayment; or seizing the check through a search warrant. If the check was cashed or the transfer of the electronic funds was completed, the Service can audit the taxpayer for the tax year and issue a notice of deficiency or can ask the Department of Justice to initiate an erroneous refund action to recover the refund. We have no objections to the use of any of these procedures in cases where the Service issues a refund to a taxpayer based on his or her electronic return, which later turns out to be an invalid return due to an alteration to the jurat made by the taxpayer on the Form 8453.

Issue 7: Whether the Service may refer the preparer of the electronic return and the associated Form 8453 for a civil investigation under section 7408.

To obtain an injunction under section 7408, the government must prove that the person has engaged in conduct subject to penalty under section 6700 or 6701 and that injunctive relief is appropriate to prevent recurrence of such conduct.

The four elements necessary to prove a violation of section 6700 are as follows: (1) the defendant organized or sold, or participated in the organization or sale of, an entity, plan, or arrangement; (2) the defendant made or caused to be made, false or fraudulent statements concerning the tax benefits to be derived from the entity, plan, or arrangement; (3) the defendant knew, or had reason to know, that the statements were false or fraudulent; and (4) the false or fraudulent statements pertained to a material matter. See United States v. Raymond, 228 F.3d 804 (7th Cir. 2000), cert. denied, 533 U.S. 902 (2001); United States Service v. Estate Preservation Services, 202 F.3d 1093, 1098 (9th Cir. 2000). In addition, section 6701 imposes a penalty on one who (1) aids or assists in, procures, or advises with respect to, the preparation or presentation of any portion of a return, affidavit, claim, or other document; (2) knows (or has reason to believe) that such portion will be used in connection with any material matter arising

under the internal revenue laws; and (3) knows that such portion (if so used) would result in an understatement of the liability for tax of another person.

In predicting the likelihood of future violations, a court must assess the totality of the circumstances surrounding the defendant and his violation, including such factors as the gravity of harm caused by the offense; the extent of the defendant's participation and his degree of scienter; the isolated or recurrent nature of the infraction and the likelihood that the defendant's customary business activities might again involve him in such transaction; the defendant's recognition of his own culpability; and the sincerity of his assurances against future violations. See SEC v. Holschuh, 694 F.2d 130, 144 (7th Cir. 1982).

The facts do not suggest that any person promoted alterations to the jurat. Moreover, there are no facts indicating what representations a promoter made to any taxpayer. Without these essential facts, we do not see any basis for a section 7408 referral. If facts become available demonstrating that there is an income tax return preparer or a promoter involved, the Frivolous Return Program should seek advice of counsel as to whether it should pursue an injunction under section 7402, 7407, or 7408.

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

Please call (202) 622-4910 if you have any further questions.