OFFICE OF
CHIEF COUNSEL

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

July 8, 1998

SCA 1998-054
TL-N-5970-97WLI#3
UILC 6011.00-00; 6065.03-00

MEMORANDUM FOR Associate District Counsel, Salt Lake City CC:WR:RMD:SLC
Attn: Mark H. Howard

FROM: Assistant Chief Counsel, CC:DOM:IT&A

SUBJECT: Significant Service Center Advice

This responds to your request for Significant Advice dated September 11 , 1997, in connection with a question posed by the Examination Function of the Tax Protestor Unit of the Ogden Service Center.

Disclosure Statement

Unless specifically marked "Acknowledged Significant Advice, May Be Disseminated" above, this memorandum is not to be circulated or disseminated except as provided in CCDM (35)2(13)3:(4)(d) and (35)2(13)4:(1)(e). This document may contain confidential information subject to the attorney-client and deliberative process privileges. Therefore, this document shall not be disclosed beyond the office or individual(s) who originated the question discussed herein and are working the matter with the requisite "need to know." In no event shall it be disclosed to taxpayers or their representatives.

ISSUE

Is a complete Form 1040 or 1040A (hereinafter collectively referred to as "Form 1040") with an addition to an otherwise effective penalties of perjury statement[1] (hereinafter "addition"), considered a return for tax purposes?

[1]The use of the phrase otherwise effective penalties of perjury statement means the taxpayer signed the statement and did not make a change to it.

CONCLUSION

If an addition to a complete Form 1040 negates[2] the penalties of perjury statement, for example by denying liability for tax, the form is a nullity. If the addition does not negate the statement but merely makes a protest against taxes or other matters, the form is a sufficient return for tax purposes.

FACTS

Service Centers often receive a complete Form 1040 containing text that the Service does not require, i.e., an addition to the Form 1040. Generally, the addition appears on the form itself immediately above or below the penalties of perjury statement, i.e., jurat. Sometimes, the addition takes the form of an attachment to the Form 1040. Your November 15, 1996, memorandum contains two exhibits with specific examples of additions to the penalties of perjury statement.

One service center pointed out to you the difficulty in determining the purpose of an addition, particularly if it contains numerous pages and assertions. Specifically, the concern involves the legal status of returns that contain an addition. You addressed this concern in your September 19, 1997, memorandum to the service center. However, subsequently the service center became aware of other procedures being used by other service centers. Because of this, you asked for our post review of this advice within the context of a significant service center advice.

DISCUSSION

Section 6001 of the Internal Revenue Code requires every person liable for tax to make a return and comply with the rules and regulations issued by the Internal Revenue Service (hereinafter "Service").

Section 6011 of the Code requires every person liable for any tax imposed by title 26 to make a return according to the forms and regulations prescribed by the Service.

Section 6065 of the Code and §1.6065-1(a) of the Income Tax Regulations require any return made under any provision of the internal revenue laws or regulations to contain or be verified by a written declaration that it is made under penalties of perjury.

---

[2] As used in this memorandum, the word negate means that an addition nullified the underlying tax purpose for the penalties of perjury statement.

If a taxpayer fails to comply with section 6065 of the Code by submitting a “return” without the executed penalties of perjury statement, that return is a nullity. Lucus v. Pilliod Lumber Co., 281 U.S. 245, 50 S. Ct. 297, 74 L. Ed. 829 (1930). For example, in Hettig v. U.S., 845 F.2d 974 (8th Cir. 1988) the court found a failure to submit a return under penalties of perjury because the taxpayers struck the words "under penalties of perjury."

A taxpayer can also negate the penalties of perjury statement with an addition. In Schmidt v. U.S., 140 B.R. 571, 572 (Bankr. W.D. Okl. 1992), the taxpayers filed a return with the following statement at the end of the penalties of perjury statement, "SIGNED UNDER DURESS, SEE STATEMENT ATTACHED." In the attachment, the taxpayers denied liability for tax on wages. The Service argued that the statement, added to the return, qualified the penalties of perjury statement making it ineffective and the return a nullity.

In agreeing with the Service, the court pointed out that the voluntary nature of our tax system causes the Service to rely on a taxpayer's self-assessment and on a taxpayer's assurance that the figures supplied are true to the best of his or her knowledge. Accordingly, the penalties of perjury statement has significant importance in the administration of our tax system. The statement connects the taxpayer's attestation of tax liability with the Service's statutory ability to summarily assess the tax.

Similarly, in Sloan v. C.I.R., 53 F.3d 799, 800 (7th Cir. 1995), the taxpayers submitted a return containing the words, "Denial & Disclaimer attached as part of this form" above their signatures. In the attachment the taxpayers denied liability for any individual income tax. In determining the effect of the addition on the penalties of perjury statement, the court reasoned that it is a close question whether the addition negates the penalties of perjury statement or not. The addition, according to the court, could be read just to mean that the taxpayers reserve their right to renew their constitutional challenge to the federal income tax.
However, the court held that the Service should be entitled to construe an addition against the taxpayers in cases of doubt.
In both Schmidt and Sloan the court questioned the purpose of the addition. In both, the court found the addition to deny tax liability. According, this effect rendered the purported returns invalid.[3]

---

[3] Note, however, that in Penn Mutual v. Comm’r, 32 T.C. 653 (1959), aff’d 277 F.2d 16 (3d Cir. 1960), the taxpayer filed an otherwise facially complete return showing a tax due. The taxpayer attached a letter to the return denying that it owed the tax, claiming the applicable taxing statute as unconstitutional. According to the court,

Many of the additions to returns create a tension between a taxpayer's exercise of first amendment constitutional rights and a taxpayer's statutory obligation to file a tax return under penalties of perjury. If the addition both exercises a constitutionally protected right (to protest) and negates the penalties of perjury statement, most courts have held that the statutory duty to file a tax return outweighs the small infringement, if any, on a taxpayer's first amendment right to protest.

On the other hand, most courts have acknowledged those additions asserting constitutionally protected rights without negating the penalties of perjury statement. In these cases the additions had no effect on the returns. For example, in McCormick v. Comm'r, 94-1 U.S.T.C. ¶ 50,026 (E.D. N.Y. 1993), the taxpayer timely filed a complete return and signed it under penalties of perjury. Immediately below the penalties of perjury statement, the taxpayer added the statement "under protest." This addition caused the Service to treat the return as a nullity.

However, the court in McCormick considered the return effective reasoning as follows. While the law requires a return to be filed under penalties of perjury, it also protects the right of a person to protest to any branch of the government. Specifically, the first amendment to the Constitution provides "Congress shall make no law respecting...the right of the people...to petition the Government for a redress of grievances." According to the court, "[w]hat is prohibited to Congress is forbidden to the tax bureaucracy... A protest is an expression of grievance, seeking redress that the Internal Revenue Service may not throttle or mute." Id.

The purpose of the addition in McCormick was to lodge a protest rather than to deny tax liability. According to the court, with the protest language the taxpayer simultaneously exercised his first amendment right to protest to the Service and satisfied his statutory obligation to file a return.

As another example, in Todd v. U.S., 849 F.2d 365

Congress expects a return to reflect a taxpayer's self-assessment of the amount the taxpayer intends to pay without any action by the Service. In line with this statutory background, the court sought to construe the taxpayer's return as valid. It did so by finding the return as merely reflecting that the taxpayer legally owed no tax and had no intent to remit the tax due as shown on the return. In other words, the court cast the return as a "no tax" return, rather than as a nullity.

In our view Penn is distinguishable from Schmidt and Sloan. In Penn the taxpayer challenged a specific, but not every, statute imposing a tax.

(9th Cir. 1988) the taxpayer filed a complete return, containing an executed penalties of perjury statement. Immediately below the statement, the taxpayer added the words, "[s]igned involuntarily under penalty of statutory punishment." The Service imposed a frivolous return penalty under section 6702 of the Code. The taxpayer filed suit in district court contending that the imposition of the penalty violated her constitutional rights. In the process of the litigation, the government stipulated to the improper assessment of the penalty against the taxpayer because the taxpayer had provided a complete and accurate return. Id. at 368. In essence, with the addition the taxpayer merely made a protest, but not a denial of her tax liability, and satisfied the statutory obligation to file her return simultaneously.

In McCormick and Todd, the courts analyzed the purpose of the addition to determine whether it denied tax liability. In each of these cases, the court found otherwise.

Applying the purpose test whenever an addition appears on a tax return retards efficient processing of returns; administering the test requires human intervention. Moreover, the test may not readily produce an answer for additions with ambiguous language. Therefore, when the Code and Editing Function at a service center receives any Form 1040 with an addition on the form itself or reflected in an attachment to the form, that function should promptly send the form to the Examination Function.

With respect to the Examination Function, we agree with your recommendations. Thus, if the Examination Function determines that a taxpayer's addition has negated an otherwise effective penalties of perjury statement, the form is not a return. If the Examination Function determines that the addition to the otherwise effective penalties of perjury statement merely reflects the taxpayer's exercise of a constitutionally protected right, the form is a return. In the latter case, of course, the addition must neither deny liability for tax nor otherwise negate the penalties of perjury statement. The Examination Function should contact District Counsel regarding the disposition of forms containing ambiguous or doubtful additions.

Moreover, for processing purposes only the Examination Function should consider all forms containing additions to an otherwise effective penalties of perjury statement, regardless of their effect, as valid returns. Accordingly, after conducting an in-depth audit of the "return," the Examination Function should issue a notice of deficiency for the taxes due to the taxpayer filing that "return." As you state in your

memorandum, these procedures will ensure the collection of tax with respect to a return classified erroneously as a nullity.[4]

If you have any questions, please contact Ms. Renay France, an attorney of my staff, on 202-622-4940.

JODY J. BREWSTER

By: /s/
JUDITH M. WALL
Chief, Branch 4

[4] Treating all Forms 1040 with additions as returns, regardless of their effect, will protect assessment of the tax if the Service mistakenly decides the form is a nullity. With this treatment, the Service will issue a statutory notice of deficiency for the tax due. Therefore, the assessment of tax will not be barred by the statute of limitations, if, for example, a court were to subsequently decide that the form is a return.