



DEPARTMENT OF THE TREASURY  
INTERNAL REVENUE SERVICE  
WASHINGTON, D.C. 20224  
May 26, 1999

OFFICE OF  
CHIEF COUNSEL

UIL: 9999.98-00

Number: **199937004**

Release Date: 9/17/1999

MEMORANDUM FOR

FROM: Peter K. Reilly  
CC:DOM:FS:PROC

SUBJECT:

We are writing in response to your proposed motion in the above case.

You noted that the \_\_\_\_\_ is sending Notices of Deficiency to non-filers asserting a penalty under I.R.C. § 6651(a)(2). The service center is not preparing substitutes for returns pursuant to I.R.C. § 6020. You correctly concluded that the penalty under I.R.C. § 6651(a)(2) cannot be asserted if no return or substitute for return is filed. See Rev. Rul. 76-562, 1976-2 C.B. 430; Johnson v. Commissioner, T.C. Memo. 1983-398, 46 T.C.M. (CCH) 694. But we do not agree with your motion to dismiss for lack of jurisdiction or the response in paragraph three of your answer.

In support of your motion to dismiss for lack of jurisdiction you cited Estate of Young v. Commissioner, 81 T.C. 879 (1983) (holding that, where an estate tax return was filed, the court did not have jurisdiction over the penalty under I.R.C. § 6651(a)(2) because it was not attributable to a deficiency). This case is no longer valid as it was specifically overruled in 1986 when the language in I.R.C. § 6214(a) was changed from "an addition to tax" to "any addition to the tax." See S.R. No. 99-313 at 200, 1976-3 C.B. (Vol. 3) 200 ("The committee believes that it is appropriate for the Tax Court to have jurisdiction over this addition to tax [under I.R.C. § 6651(a)(2) if it already has jurisdiction with respect to that tax return.]; Estate of Nemerov v. Commissioner, T.C. Memo. 1998-186 (holding that the Tax Court does have jurisdiction to determine the addition to tax under I.R.C. § 6651(a)(2)). Furthermore, Estate of Young stated "[n]or do we hold that this Court lacks such jurisdiction [over the penalty under I.R.C. § 6651(a)(2)] if no return is filed," Estate of Young, 81 T.C. at 888, and a prior decision determined that no addition under I.R.C. § 6651(a)(2) was due in a case where a valid return was not filed. Johnson, 46 T.C.M. (CCH) at 697.

Though we do not agree with your motion we do agree that the addition to tax under I.R.C. § 6651(a)(2) is not proper. We agree with your admission in paragraph 4(c) of the answer. Further, we recommend that you enter into a stipulation with the taxpayer reflecting our concession of the addition to tax under I.R.C. § 6651(a)(2).

If you have any questions regarding this memo, please contact Todd Ludeke at (202) 622-8108.