Office of Chief Counsel
Internal Revenue Service
Memorandum

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to: Associate Area Counsel (Salt Lake City)
(Small Business/Self-Employed)

from: Ashton P. Trice
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subject: Proper treatment of zero returns filed with a claim of "nunc pro tunc" status

This Chief Counsel Advice responds to your request for assistance dated July 28, 2004. This advice may not be used or cited as precedent.

ISSUES

1. Frivolous Return
Should the IRS treat “zero returns” claiming nunc pro tunc status as frivolous and subject to the penalty under I.R.C. § 6702?

2. Valid and Processible Return
Should the IRS treat these returns as valid for purposes of processing?

3. False or Fraudulent Return
Do the returns qualify as false or fraudulent returns such that the IRS could apply the unlimited statute of limitations on assessment found in I.R.C. § 6501(c)(1)?

CONCLUSIONS

1. Frivolous Return
We agree with your conclusion that the Service may treat these zero returns as frivolous for purposes of I.R.C. § 6702.

2. Valid and Processible Return

Although most Circuits hold that "zero returns" are invalid, we cannot provide a general ruling that all such returns are invalid because we must contend with the decision in Long, and because the validity of a return is based on all facts and circumstances.

The "nunc pro tunc" phrase handwritten or stamped onto a return has no legal effect on the validity of a return. Outside of the Ninth Circuit, zero returns with "nunc pro tunc" language that fail to meet the "substantial compliance" standard, are invalid, and do not trigger the application of the limitations period on assessment. Good tax administration, however, calls for the Service to treat all zero returns as if they were valid unless the Ninth Circuit's position in Long is reversed.

3. False or Fraudulent Return

Because the determination of whether a taxpayer filed a false or fraudulent return with the intent to evade tax is a subjective determination, the Service must determine whether the unlimited period of limitations in I.R.C. § 6501(c)(1) would apply on a case-by-case basis.

FACTS

The facts as described in your July 28, 2004, memorandum indicate that the Frivolous Return Program in Ogden provided to the Associate Area Counsel in Salt Lake City five sample Forms 1040 filed by taxpayers for various tax years. Three of the sample returns lacked the second page of the Form 1040. Each of the returns contained the words "nunc-pro-tunc" on some portion of the filed documents. The words "nunc-pro-tunc" were stamped on two of the returns and handwritten on the other three. All of the returns contained entries of zeros or no data, except for the line entries involving withholding and refunds. No Forms W-2 were attached to the sample returns. One of the returns requested a refund but showed no withholding.

LAW AND ANALYSIS

1. Frivolous Return

We agree with your analysis of the frivolous return issue.

2. Valid and Processible Return

Section 6001 of the Internal Revenue Code ("Code") provides that every person who is liable for any federal tax shall make appropriate returns and comply with all applicable rules and regulations. Section 6011 of the Code mandates that any person liable for any federal tax shall "make a return or statement according to the forms and regulations prescribed by the Secretary." As further provided in that section, such returns or statements shall include the information required by such forms or regulations. Section 6012 of the Code sets out specifically which individuals are required to file returns of income and which are exempt. Treasury Regulation § 1.6012-1(a)(6) prescribes Form 1040 as the form for making the income tax return required of an individual. Furthermore, I.R.C. § 6065 directs that, except as provided by the Secretary, any return

required to be made under the Code or regulations shall be verified by a written declaration that is made under the penalties of perjury.

Section 6501 of the Code provides that, with some exceptions, the period of limitations on assessment of tax ends three years after the return is filed. Section 6501(c)(3) provides that where a taxpayer does not file a return, assessment or collection without assessment may begin at any time. Where a taxpayer files a return without requisite information, leaves some fields blank, enters zeros, and writes "nunc pro tunc" on the face of the return, the issue arises whether such a return is a valid return so that the Service must assess within three years of the return's filing, or whether the return is invalid such that no return has been filed and, under I.R.C. § 6501(c)(3), the Service may assess against a taxpayer at any time.

A. "Nunc Pro Tunc"

"Nunc pro tunc" is a Latin phrase which means "now for then." Black's Law Dictionary provides that this phrase applies to "[a]cts allowed to be done after the time when they should be done, with a retroactive effect, *i.e.*, with the same effect as if regularly done. Nunc pro tunc entry is an entry made now of something actually previously done to have effect of former date; office being not to supply omitted action, but to supply omission in record of action really had but omitted through inadvertence or mistake." Black's Law Dictionary 1069 (6th ed. 1990).

The leading case raising the issue of altered returns and their validity is Beard v. Commissioner, 82 T.C. 766 (1984), aff'd per curiam, 793 F.2d 139 (6th Cir. 1986). In that case the taxpayer made a number of significant alterations to the Form 1040. For example, the taxpayer crossed out "Income" on a number of return lines and inserted "gain" on some lines and "Receipts" on others. He replaced the phrase "Employee business expense (attach Form 2106)" with "Non-taxable income." The Tax Court held that the alterations made the taxpayer's filing a nullity. The court stated:

> The statutory grant of authority to the Treasury requires that taxpayers make a return or statement according to the forms and regulations prescribed by the Secretary of the Treasury. These regulations mandate the use of the proper official form, except as noted below. . . . The U.S. Supreme Court in the case of Commissioner v. Lane-Wells Co., 321 U.S. 219 (1944), has recognized this mandate in stating:
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> > Congress has given discretion to the Commissioner to prescribe by regulation forms of returns and has made it the duty of the taxpayer to comply. It thus implements the system of self assessment which is so largely the basis of our American scheme of income taxation. The purpose is not alone to get tax information in some form but also to get it with such *uniformity, completeness*, and *arrangement* that the physical task of handling and verifying returns may be readily accomplished. [321 U.S. at 223 (emphasis added).]

Id. at 775 (footnote omitted).

The addition of the phrase "nunc pro tunc" is an alteration to a return, but does not cause the return to be treated as a nullity because, in contrast with Beard, this was the only alteration made to the returns. The words "nunc pro tunc" added to a return signal a taxpayer's willingness to challenge the Service's authority to tax. These words, however, do not convey any legal meaning and can be ignored in determining the return's validity.

Although we are not told the exact location of the words "nunc pro tunc" on the returns, even if the words had been placed on the jurat, this simple alteration of the jurat would not invalidate the taxpayer's signature. Compare Williams v. Commissioner, 114 T.C. 136, 142 (2000) and McCormick v. Peterson, 94-1 USTC ¶ 50-026 (CCH) (E.D.N.Y. 1993), acq., 1998-2 C.B. xix (writing "under protest" above the signature line on a jurat does not invalidate the taxpayer's return), with United States v. Moore, 627 F.2d 830, 834 (7th Cir. 1980) (striking or obliterating the jurat on a return negates the requirement that a return must be signed under penalties of perjury; therefore, such return is not a valid return).

Because the addition of "nunc pro tunc" does not have any legal effect on the return, we are left with the issue of whether returns with omissions, zeros, and missing second pages of Forms 1040 are valid. Returns with zeros or missing information are generally known as "zero returns." Typically such taxpayers attach Forms W-2 and fill in the Form 1040, except for the withholding and refund lines, with zeros. We note that the sample returns did not have the Forms W-2 attached.

B. Zero Returns

It has been common to refer to zero returns as "processible," "frivolous," and "valid" or "invalid." To provide a comprehensive response to your question it is best to consider each one of these terms in isolation as they present three distinct legal issues.

I. "Processible"

The term "processible form" is defined by statute. Section 6611 of the Code provides that for purposes of determining when interest begins to accrue on an overpayment, a return is treated as filed only after it was filed in "processible form." I.R.C. § 6611(g)(1). A return is in processible form if (A) the return is filed on a permitted form, and (B) the return contains (i) the taxpayer's name, address, and identifying number and the required signature, and (ii) sufficient required information (whether on the return or on required attachments) to permit the mathematical verification of tax liability shown on the return. I.R.C. § 6611(g)(2). Returns with zeros, blank spaces and/or missing second pages of the Form 1040 are not processible within the meaning of this section because they fail to provide "sufficient required information (whether on the return or on

required attachments) to permit the mathematical verification of tax liability shown on the return" I.R.C. § 6611(g)(2)(B)(ii).

II. Frivolous

Whether a zero return is a frivolous return for purposes of I.R.C. § 6702 is discussed in depth in a recently issued revenue ruling. Revenue Ruling 2004-34, 2004-12 I.R.B. 619, provides that taxpayers cannot use "zero returns" to avoid or evade federal income tax liability. Moreover, the ruling clearly states that "[t]he zero return position has no merit and is frivolous." Id. In addition to the frivolous return penalty under I.R.C. § 6702, the ruling provides that the taxpayers filing such returns may be subject to penalties as provided in I.R.C. §§ 6662, 6663, 6673 and other applicable provisions.

III. Valid

The Code is silent on the issue of what constitutes a valid return for purposes of statute of limitations and various penalties under the Code. This issue, however, has been extensively litigated. Beard is the leading authority on tax return validity. It sets out a four-prong test to determine whether a return is valid. 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, 82 T.C. at 777. In applying this test, also known as the "substantial compliance" standard, we must take into consideration all facts and circumstances.

The majority of courts have held that returns with all zeros fail to meet the substantial compliance standard because such returns fail to provide sufficient data to calculate tax liability and/or do not present an honest and reasonable attempt to satisfy the requirements of the tax law. In United States v. Smith, 618 F.2d 280, 281 (5th Cir. 1980), the court held that returns containing nothing but zeros and constitutional objections plainly did not purport to disclose the required information. In United States v. Rickman, 638 F.2d 182, 184 (10th Cir. 1980), the Tenth Circuit reached the same result, holding that a zero return "did not reflect income." See also Taylor v. United States, 87 A.F.T.R.2d (RIA) 2518 (D.C. Cir. 2001) (holding a zero return did not contain sufficient data to allow calculation of tax and was not an honest and reasonable attempt to satisfy the requirements of the tax law). See also Cabirac v. Commissioner, 120 T.C. 163, 169 (2003) (filing of a zero return does not constitute an honest and reasonable attempt to supply the information required by the Code).

Furthermore, when it is apparent that the taxpayer failed to file forms accurately disclosing income, the taxpayer can be charged with the criminal offense of failure to file a return under I.R.C. § 7203. United States v. Moore, 627 F.2d 830 (7th Cir. 1980). The

court further stated that "[i]n the tax protestor cases, it is obvious that there is no honest and genuine' attempt to meet the requirements of the code. In our self-reporting tax system the government should not be forced to accept as a return a document which plainly is not intended to give the required information." Id. at 835.

In United States v. Mosel, 738 F.2d 157 (6th Cir. 1984) (per curiam), the court upheld a taxpayer's criminal conviction where the taxpayer filled in each of the blank spaces on the Form 1040 with zeros. The court held that the taxpayer failed to include any information upon which tax could be calculated and therefore such a document could not be rationally construed as a return. Id. at 158-59. In upholding Mosel's conviction the court agreed with the positions taken by the courts in Seventh and Fifth Circuits while expressly rejecting the position taken by the Ninth Circuit in United States v. Long, 618 F.2d 74 (9th Cir. 1980) In Long, reversing the district court's decision, the Ninth Circuit held that a zero return is a valid return because it contained "information related to the taxpayers income from which the tax could have been computed." Id. at 75. In its ruling the court adopted the test articulated in United States v. Porth, 426 F.2d 519, 523 (10th Cir. 1970). The Tenth Circuit in Porth held that the Code requires disclosure of "information relating to the taxpayer's income from which the tax can be computed." Id. (filing a return with only the taxpayer's name and reference to various constitutional provisions challenging the tax return filing requirement is a nullity because such a return is completely devoid of information concerning taxpayer's income as required by the regulations of the IRS).

In reaching its conclusion, the Ninth Circuit stated:

> The I.R.S. could calculate assessments from Long's string of zeros, just as it could if Long had entered other numbers. The resulting assessments might not reflect Long's actual tax liability, but some computation was possible. In this respect, the circumstances here differ from those in Porth and similar cases in which defendants failed to complete tax forms or left them blank. Nothing can be calculated from a blank, but a zero, like other figures, has significance. A return containing false or misleading figures is still a return. False figures convey false information, but they convey information.

Long, 618 F.2d at 75.

Although the Ninth Circuit reaffirmed Long in United States v. Kimball, 925 F.2d 356 (9th Cir. 1991), most courts have criticized and refused to follow Long. See United States v. Mosel, 738 F.2d 157 (6th Cir. 1984). The Tenth Circuit, upon which the Long court relied, has expressly rejected Long in Rickman, 638 F.2d at 184. The disagreement with Long has been expressly stated in Taylor v. United States, 87 A.F.T.R.2d (RIA) 2001-2518 (D.C. Cir. 2001) (holding in Long is "decidedly a minority view and with which this Court disagrees"). See also Cabirac, 120 T.C. 163 (stating that the holding in Long represents the minority view the Tax Court refused to follow it). In Cabirac, the Tax Court concluded that a zero return is an invalid return because the

taxpayer "did not make an honest and reasonable attempt to supply the information required by the Internal Revenue Code." Id. at 169.

The holding in Long was also rejected in United States v. Grabinski, 727 F.2d 681, 687 (8th Cir. 1984), when the Eighth Circuit held that a document did not meet the substantial compliance standard and was, therefore, not a return where the only tax liability was zero and the taxpayer provided no other financial information. The court stated that the Service "should not have to accept on faith the taxpayer's assertions regarding taxable income or tax liability without knowledge of circumstances regarding, among other things, gross income received or deductions claimed." Id. at 686. The court determined that the taxpayer's assertions that he had zero income did not inform the Service of his gross income or from where his income was derived, and that the Service could not verify the taxpayer's computations. Id. at 687. As a result, the court held the document was not a return and that taxpayers should provide all information requested by the Service which is not subject to a valid constitutional or legal privilege.

Although the Ninth Circuit's position is not congruent with the rest of the circuits, until Long is overruled, we must respect it. In our opinion the unusual facts in Long make its holding, absent similar facts, questionable. In Long, the court overturned a taxpayer's criminal conviction of willful failure to file income tax returns. In his defense the taxpayer asserted that he had filed tax returns on which he inserted zeros for exemptions, income, tax, and tax withheld. As the court noted for the years in litigation, however, it was the Service's practice not to keep records of taxpayer's filings if the returns contained zeros. In reversing the taxpayer's conviction the court stated that the Service failed to establish that the taxpayer willfully failed to file tax returns because the government was unable to prove that defendant had not filed forms filled in with zeros.

Despite the overwhelming authority indicating that zero returns fail the substantial compliance test, we are not prepared to change our opinion that the Service should treat zero returns that are properly signed under penalties of perjury as valid. By treating zero returns as valid and processing[1] them in a timely manner the opportunity to challenge the taxpayer's position and assess taxpayer for additional tax remains open within the applicable statute of limitations. On the other hand, treating a zero return as invalid and not processing it may result in a loss of an opportunity to assess additional tax if the three-year statute of limitations expires, the taxpayer later challenges the Service's determination, and a court that finds that the return was valid. Treating zero returns as valid facilitates uniform application of the law and avoids a need to treat returns from the Ninth Circuit differently. Administratively, uniformity is desirable because the Service can avoid making fact specific legal determination as to the validity of each return and guessing the jurisdiction of potential litigation.

[1] "Processing" in this context means that the returns should be retained, treated as valid, and processed. In other words, the returns should not be rejected. Generally, however, no refunds should be made from these returns; nor should interest be paid until the return is "processible" within the meaning of I.R.C. § 6611(g). See the discussion of "Processible," above.

Furthermore, additional time for assessment may be allowed under I.R.C. § 6501(c)(1) and (e).

The facts as presented to us indicate that there might be a number of different types of returns at issue. We are given only a summary of the five returns referred to you from the Frivolous Return Program in Ogden. Because we lack specific facts with respect to each of the five returns we cannot make a determination as to the validity of any of them. The words "nunc pro tunc," however, have no effect on the validity or processibility of a return.

You state that some of the filed returns were missing the second page of the Form 1040; clearly, such returns completely fail to provide the Service with any information upon which tax liability can be computed. Moreover, they would fail even under Long, because they are not signed under penalties of perjury. It is clearly the law that where a taxpayer leaves the Form 1040 blank with or without proper verification, the taxpayer's filing is a nullity, as such it does not satisfy the requirements to start the running of the statute of limitations. On the other hand, returns with all zeros that are properly signed should be processed and treated as valid until the split in circuits is resolved.

We would like to suggest that you identify zero return cases with desirable facts to litigate in the Ninth Circuit. Meanwhile, the Service should process the arguably valid zero returns that taxpayers sign with proper jurats. The Service should keep records of such returns and any attachments.

3. False or Fraudulent Return

As a general matter, we do not recommend relying on an unlimited statute of limitations in these cases. Section 6501(c)(1) allows the Service to assess tax at any time in the case of either a "false or fraudulent return with the intent to evade tax." Whether a particular taxpayer had the requisite intent to evade tax is a subjective determination and must be made on a case-by-case basis. Because of the subjective nature of the "intent to evade tax" language in the definition of fraud (see, e.g., Toussaint v. Commissioner, 743 F.2d 309, 312 (5th Cir. 1984), aff'g T.C. Memo. 1984-25 (fraud "is never imputed or presumed;" a court should not find fraud where the evidence shows "at most only suspicion")), we recommend that other options be explored before relying on an unlimited period of limitations. Further development of individual cases may lead to information suggestive of fraud, however, and in such cases we agree that application of the extended period is appropriate.

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Please call 202 622-4940 if you have any further questions.