Office of Chief Counsel
Internal Revenue Service

memorandum

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subject: **Conversion of a 1040 Return with an ITIN to a 1040NR Return**

This responds to your request for Significant Service Center Advice in connection with a series of questions concerning the conversion of a Form 1040 Return with an ITIN to a Form 1040NR Return.

Issues

1. Whether a Form 1040, "U.S. Individual Income Tax Return," shall be converted to a Form 1040NR, "U.S. Nonresident Alien Income Tax Return," if the taxpayer fails to meet the green card or substantial presence test.

2. Whether the Internal Revenue Service ("Service") may convert a Form 1040 to a Form 1040NR which would include the elimination of certain tax advantages; and, whether the filing of a Form 1040 return by a non-resident alien with an Individual Taxpayer Identification Number ("ITIN") constitutes the filing of an income tax return and is considered a valid return.

Overview

The Internal Revenue Code ("Code") requires all individuals to file U.S. tax returns if they have gross income subject to U.S. tax that equals or exceeds the exemption amount as determined by § 6012 of the Code. A nonresident alien's liability for U.S. taxes is generally limited to U.S. source income and is often subject to tax treaty provisions that further define their liability for tax and withholding. Typically, these taxpayers use an ITIN to file Form 1040NR with the Service and/or Forms W-8, "Certificate of Foreign Status," with financial institutions to claim tax treaty withholding benefits. Resident aliens for U.S. tax purposes include those who are lawful permanent residents and eligible to obtain a Social Security Number ("SSN") and work in the U.S.

Resident aliens also include any foreign nationals physically present in the U.S. for a set number of days computed under a formula (generally 31 days in the current year and 183 days counting the current and prior two years). This rule does not apply to regular commuters from Mexico or Canada who remain non-resident aliens. Resident aliens must file Form 1040 series tax returns and report worldwide income in the same manner as U.S. citizens. If they are not eligible for an SSN, they must obtain and use an ITIN. However, the Service continues to consider illegal aliens as U.S. residents for tax purposes, which permits aliens to file individual income tax returns on Forms 1040. As a result, illegal aliens are receiving tax benefits which exceed those received by non-resident alien taxpayers (Form 1040NR filers) that are in compliance with U.S. Immigration Laws.

As a general rule, resident aliens are taxed in the same manner as U.S. citizens. Nonresident aliens are taxed pursuant to § 7701(b) of the Code, which articulates the tax residency rules. Under the tax residency rules of § 7701(b) generally, any alien who is not a resident alien must be a nonresident alien. An alien can become a resident alien in one of three ways: (1) by being lawfully admitted to the United States for permanent residence under the immigration laws (the Green Card test); (2) by meeting the Substantial Presence Test (a numerical formula which measures days of presence in the United States); or (3) by making the "First Year Election" (a numerical formula under which an alien may pass the substantial presence test one year earlier than under normal rules). See, § 7701(b)(1)(A).

Law and Analysis

Issue 1

Section 7701(b)(1)(A) provides that an alien individual is treated as a resident alien if he (i) is a lawful permanent resident of the United States (green card holder), (ii) meets the substantial presence test of § 7701(b)(3), or (iii) makes the first year election provided in
§ 7701(b)(4).

Section 7701(b)(1)(B) provides that a individual is a nonresident alien if he is neither a citizen of the United States nor a resident alien under § 7701(b)(1)(A).

Section 6012(a)(1)(A) provides, with certain exceptions, that returns with respect to income taxes under subtitle A must be made by every individual having for the taxable year gross income that equals or exceeds the exemption amount. Section 6012(a) also provides that subject to such conditions, limitations, and exceptions and under such regulations as may be prescribed, nonresident alien individuals subject to the tax imposed by § 871 may be exempted from the requirement of making returns.

Section 1.6012-1(a) of the Income Tax Regulations ("regulations") sets forth rules for income tax returns to be filed by U.S. citizens and resident aliens (including nonresident alien spouses who make an election under § 6013(g) to be treated as a resident).

Section 1.6012-1(b) of the regulations sets forth rules for income tax returns to be filed by nonresident alien individuals. It expressly refers to Form 1040NR.

If an alien individual fails to be classified as a resident alien under one of the three tests specified in § 7701(b)(1)(A), and if he has not made an election under § 6013(g) to be treated as a resident, then he is covered by § 1.6012-1(b), rather than § 1.6012-1(a), and he should file Form 1040NR, not Form 1040.

Issue 2

The impetus for this request for advice is that the requestor would like to extrapolate information from a Form 1040 filed by a taxpayer and use that information to fill out a Form 1040NR for that taxpayer. That is, the Service would not respect the return filed by the taxpayer but instead would extrapolate certain information from it to a Form 1040NR created by the Service and processed as if the taxpayer had signed the Form 1040NR. In essence, the Service Center is basically preparing a substitute for return and assessing without resort to deficiency procedures.

More specifically, when a Form 1040 arrives at the Service Center with an ITIN, it will be checked to see if it meets one of the three resident alien requirements, including the substantial presence test. If the Form 1040 does not meet the requirements, the Service Center will extrapolate applicable information from the Form 1040 and fill out a Form 1040NR for the taxpayer. The Service Center will then assess the amounts shown on the Form 1040NR and not from the Form 1040 actually filed by the taxpayer. It should be noted that various line items such as the earned income tax credit and the child tax credit allowed for a Form 1040 are not available for filers of a Form 1040NR.

The Code has very specific requirements for filing returns, assessing tax on returns and determining deficiencies in tax so that additional assessments may be made. Section 6012 requires that certain individuals having the requisite amount of gross income file federal income tax returns. Section 6201(a)(1) provides that the Service shall assess all taxes determined by the taxpayer on such returns. Sections 6212-6215 impose limitations on the manner in which the Service may assess any deficiency in taxes. Once a "return" within the meaning of § 6201(a)(1) is filed, these provisions do not permit the Service to adjust a taxpayer's account without following those prescribed procedures.

Generally, the Service has the authority to require taxpayers to file their returns on the correct form; however, a document may qualify as a return so long as it meets certain requirements. See Commissioner v. Lane-Wells, 321 U.S. 219 (1944); Germantown Co. v. Commissioner, 309 U.S. 304 (1940); Zellerbach Paper Co. v. Helvering, 293 U.S. 172 (1934). In Beard v. Commissioner, 82 T.C. 766, 777 (1984), aff'd, 793 F.2d 139 (6th Cir. 1986), the court summarized the relevant Supreme Court case law as follows:

> First, there must be 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.

A taxpayer filing a Form 1040 would normally meet these elements. The fact that the taxpayer filed on a form other than Form 1040NR would not prevent the Form 1040 from qualifying as a "return" under the case law. If the Service determines that the amounts shown on the Form 1040 are incorrect and wishes to adjust those amounts, normal assessment procedures must be followed to correct the taxpayer's tax liability. We cannot merely self-assess a return under § 6201(a)(1) prepared by a Service Center employee.

If you have any questions, please contact at .