Internal Revenue Service
memorandum

date:

to: Assistant Regional Commissioners (Examination and Collection)

from: Assistant Commissioner (Examination) EX
Assistant Commissioner (Collection) CO

17 MAR 1989

subject: Substitute for Returns and Joint Filing Status

We have attached a copy of a Notice from the Office of Chief Counsel, Tax Litigation Division, that is being issued to all field offices. The Notice authorizes trial attorneys to concede joint filing status in substitute for return cases (IRC 6020(b)) in which no separate return was ever filed by either spouse. The recent ruling in Millsap, 91 TC No. 58, and other administrative considerations are cited as factors weighing in this decision.

As a result of recent discussions on this issue and the attached Notice, we will now allow joint filing status on all substitute for return cases, whether or not a Notice of Deficiency has been issued. The only two exceptions apply to cases in which: 1) the taxpayer has filed a petition with the U.S. Tax Court, or 2) one or both spouses previously filed separate returns. In the former case, we no longer have jurisdiction over the taxpayer's return. In the latter situation, the joint filing restrictions of IRC 6013(b), as discussed in our memorandum of October 24, 1988, will apply.

While these guidelines will help to resolve current inventories, future guidance will be provided regarding claims for refund on previous denials of joint filing status.

If you have any questions, please have a member of your staff contact Duke Lokka (EX:E:I) of my staff at FTS 566-6474 or Lois Earley (CO:O:SC) in Collection at FTS 343-9673.

COLLECTION DIVISION

	RESP	ACTION	CORD	INFO
CHIEF, FB I				
CHIEF, FB II		✓		
CHIEF, FB III				✓
CHIEF, SPF				✓
CHIEF, T & S				✓
STAFF ASST.				✓
MGMT. ANAL.				
CADRE MGR.				✓

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DIST.	RESP.	INFO.
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Department of the Treasury | Internal Revenue Service

Office of Chief Counsel **Notice**

Subject: Joint Return Election- Taxpayers subject to the Substitute for Return Program Cancellation Date:

I. Purpose: This Notice is to advise all field offices of the new position of the office regarding the election of joint return status by married taxpayers who failed to file any income tax returns prior to the filing of joint returns.

II. Effective Date: Upon Issuance

III. Current Position: Married taxpayers who file an original joint return prior to the submission of a case for decision are entitled under I.R.C. § 6013(a) to the benefit of joint rates if no separate return has been filed by the taxpayers prior to the joint return filing. Neither the preparation of a return by the Commissioner on behalf of a taxpayer (under I.R.C. § 6020(b)), nor the issuance of a notice of deficiency shall serve as a prior return of the taxpayer so as to invoke the limitations for making of joint election under I.R.C. § 6013(b).

IV. Background: I.R.C. § 6013(b) precludes a married individual who has filed a separate return for a taxable year from making a joint return for that year after the due date of the original return if the conditions set forth in I.R.C. § 6013(b)(2) are not met. Although I.R.C. § 6013(b) does not specifically address nonfilers, it had been the position of the Service and was held in Durovic v. Commissioner, 54 T.C. 1364 (1970), aff'd on this issue, 487 F.2d 36 (7th Cir. 1973), that taxpayers who fail to file any return until after the limitation periods set forth in I.R.C. § 6013(b)(2) are precluded by I.R.C. § 6013(b)(2) from obtaining joint return benefits. Until Phillips v. Commissioner, 86 T.C. 433 (1986), aff'd on this issue, 851 F.2d 1492 (D.C. Cir. 1988), the Tax Court had followed the Durovic rule for approximately 16 years.

V. Discussion: In Durovic, the Tax Court based its denial of joint rates upon an equitable concept and not upon a statutory requirement. By its literal terms, I.R.C. § 6013(b) only applies where the taxpayer has previously elected separated rates by filing separate returns.

Filing Instructions: Binder_____ Master Sets: NO X RO X

NO: Circulate__ Distribute X to: All Personnel__ Attorneys X in: Tax Litigation

RO: Circulate__ Distribute X to: All Personnel__ Attorneys X in: _____

Other _____

In Phillips, the Tax Court overruled Durovic and held that a taxpayer who fails to file income tax returns prior to the issuance of the statutory notice of deficiency for the tax years involved is not precluded from obtaining the benefit of joint rates where joint returns are filed and no prior return has been filed for either the taxpayer or his spouse. In so holding, the Tax Court and the circuit court reasoned that the legislative history and the clear statutory language of I.R.C. § 6013 suggest that the right to make a joint return is not affected by the limitations of I.R.C. § 6013(b) where no return has been previously filed for married taxpayers. Subsequent to the Tax Court opinion but prior to the circuit court opinion in Phillips, the Tenth Circuit in Smalldridge v. Commissioner, 804 F.2d 125 (10th Cir. 1986) concluded that a married taxpayer was precluded from filing a joint return where the Commissioner filed on taxpayer's behalf (using married filing separately rates) returns under I.R.C. § 6020(b).

In Millsap v. Commissioner, 91 T.C. No. 58 (Nov. 22, 1988), the Tax Court revisited the fact situation of Smalldridge. There, the Tax Court concluded that I.R.C. § 6020(b) returns prepared by the Commissioner on taxpayer's behalf do not constitute "separate" returns for purposes of I.R.C. § 6013(b). Thus it declined to follow Smalldridge and held that I.R.C. § 6020(b) returns prepared by the Commissioner do not preclude a taxpayer from obtaining the benefit of joint rates under I.R.C. § 6013.

Although we have some concern with the reasoning of the courts in Phillips and Millsap, there is support for the decision in those cases that taxpayers should have an initial opportunity to make a filing status election. This is because the decision does comport with the language of the statute. Furthermore, it is felt that the administrative costs and burden of processing returns of taxpayers for whom the Service has prepared substitute returns would greatly decrease and that tax compliance would increase if such taxpayers who submitted with their spouse joint returns were not denied under I.R.C. § 6013(b) joint return benefits where no prior return had been filed by either spouse. Therefore, in light of the reasons noted, we will acquiesce to the holdings in Phillips and Millsap, and the rationales of Durovic and Smalldridge (and the cases following those decisions) will no longer be argued by Counsel. Rather, the limitations under I.R.C. § 6013(b) will only be invoked where the taxpayer or his/her spouse has previously filed a separate return for the year in issue.