The Function of Forms in the Substitute-for-Return Process

By Bryan T. Camp

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This column generally explores the laws and policies of tax administration to help guide readers through the thickets of particular procedural problems while also giving them a sense of the larger tax administration forest.

Prof. Camp dedicates today's column to the many "workhorse" attorneys in the IRS Office of Chief Counsel, whose commitment to the cause of good tax administration cannot be questioned, even though their work products sometimes can and should be.

As for his own work product, Prof. Camp hopes that readers will call to his attention any errors they find or questions they have, whether big or small.

Today's column considers further the question of what constitutes a return. I previously suggested the answer to that question depends on what purpose, or function, the return is supposed to serve. A return is not simply a form, but a form that serves a function.[1] One should ignore neither form nor function, but I submit the latter is more important. The *primary* function of a return is to satisfy the legal obligation imposed on taxpayers by section 6011 to self-report their financial transactions. If a document does not sufficiently satisfy the section 6011 purpose, it should not constitute a return — regardless of its form — and the taxpayer should be subject to the appropriate sanction for failing to comply with the law.[2] At the same time, the law requires forms for the excellent reason that the IRS must process hundreds of millions of returns. If taxpayers could fulfill their section 6011 responsibility using just any old scrap of paper, "the business of tax collecting would result in insurmountable confusion."[3] That is why section 6011 and its regulations require taxpayers to use the "prescribed return forms."[4] The forms are necessary for the IRS to perform its return processing function.

The issue of what constitutes a return, therefore, is one of balance. This column continues my look at how that balance between form and function should apply to taxpayers who participate in the substitute-for-return process under section 6020. My last column reviewed how the IRS, in Rev. Rul. 74-203, had decided that a signed Form 870 should be treated "as the return of the taxpayer" within the meaning of section 6020(a) when presented to taxpayers by the IRS during the substitute-for-return process.[5] The IRS reached that result even though the Form 870 was not one of the prescribed return forms. The gist of Rev. Rul. 74-203, followed by over 30 years' worth of other IRS guidance and court opinions on the issue, was that a signed Form 870 sufficiently fulfilled the function of a return to be treated as the return of the taxpayer. In the section 6020 context, where it was the IRS preparing the return, the taxpayer should not be held accountable for the IRS's choice of what form to use. In short, form followed function.

The current IRS position is out of balance. In Rev. Rul. 2005-59, 2005-37 IRB 505, *Doc 2005-17431, 2005 TNT 162-9*, the IRS decided form was more important than function, even in the substitute-for-return process, and so reversed Rev. Rul. 74-203. It is now the IRS's position that taxpayers who sign a Form 870 presented to them by the IRS during the substitute-for-return process may not be treated as having filed a return because the Form 870 is not signed under penalties of perjury and does not "purport to be a return." In so concluding, Rev. Rul. 2005-59 relies heavily on the Tax Court's widely cited opinion in *Beard v. Commissioner*.[6] I believe the IRS misapplied *Beard* in the section 6020 context and, accordingly, Rev. Rul. 2005-59 should not have overturned Rev. Rul. 74-203. Part I gives the context and content of Rev. Rul. 2005-59. Part II explains why I think its conclusion about the law is wrong. Part III then questions the ruling on policy grounds. In short, the ruling moves the IRS onto weak legal ground for no discernable tax administration purpose.

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[1]*See* Bryan T. Camp, "The Function of Forms," *Tax Notes*, Jan. 30, 2006, p. 531.

[2]*Beard v. Commissioner*, 82 T.C. 766 (1984), *aff'd*, 793 F.2d 139 (6th Cir. 1986).

[3]*Parker v. Commissioner*, 365 F.2d 792, 780 (8th Cir. 1966).

[4]Reg. section 1.6011-1(b).

[5]*See* Bryan T. Camp, "The Never-Ending Battle," *Tax Notes*, Apr. 17, 2006, p. 373. Rev. Rul. 74-203 is at 1974-1 C.B. 330. That revenue ruling also applied to other forms, such as Form 4549, by which the taxpayer waived the section 6213 restrictions on assessment and agreed to an immediate assessment of the stated liability. In this column the term "Form 870" encompasses other forms, such as Form 4549, that serve the same purpose as Form 870 and are used the same way in the same circumstances.

[6]82 T.C. 766 (1984), *aff'd*, 793 F.2d 139 (6th Cir. 1986).

I. Context and Content of Rev. Rul. 2005-59

A. Context

Rev. Rul. 2005-59 explores the question of what constitutes a return in the context of two statutory processes: section 6020 and section 6013. As I detailed in my last column, section 6020 kicks in when a taxpayer has not filed a return. In those situations, sometimes the taxpayer needs help filing a return and so section 6020 authorizes the IRS to prepare the return for the taxpayer. Section 6020(a) provides that if the taxpayer (a) discloses "all information *necessary* for the preparation thereof" (my emphasis) and (b) "consents to sign" the document prepared by the IRS, then that document "shall be received as the return." Typically, the IRS sends a taxpayer a package of documents, some of which explain what tax liability is proposed and one of which is a consent form whereby the taxpayer agrees to the liability and forgoes the right to petition the Tax Court. That latter document is usually a Form 870, "Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment." Traditionally, the courts and the IRS have allowed a signed Form 870 to be received as the taxpayer's return under section 6020(a). In contrast, if the taxpayer either cannot be found or just blows off the IRS, then what the IRS prepares will *not* be treated as the return of the taxpayer. But it will be a section 6020(b) return, considered "prima facie good and sufficient for all legal purposes."[7] As I have maintained, once a certain point in the tax determination process is reached, it is simply too late for taxpayers to comply with their section 6011 responsibilities and they are and should be forever labeled a nonfiler for that tax period. The trick is finding that point.[8]

The central conclusion in Rev. Rul. 2005-59 is that both section 6065 and Beard categorically deny a signed Form 870 the status of return.

Section 6013 permits married taxpayers to elect to file their returns jointly. Section 6013 imposes two pertinent restrictions on that election. First is a restriction on retroactive elections, similar to the general three-year limitation for amending returns. If either taxpayer has filed a return for the year in question, section 6013(b)(2)(A) prohibits a retroactive election for that year unless it is one of the three previous years. Second, section 6013(b)(2)(B) prohibits an election after either taxpayer has, in response to a notice of deficiency, petitioned the Tax Court within the 90-day period. Thus, if neither spouse has filed a return for a given year, they can make the section 6013 election up until they choose to contest a proposed deficiency in Tax Court. If either spouse has filed a previous return, however, they basically have three years to make the joint election for that year. Finally, once taxpayers have filed a valid joint return, they cannot simply undo the election.[9] They must instead apply for relief under section 6015.[10]

B. Content

The central conclusion in Rev. Rul. 2005-59 is that both section 6065 and *Beard* categorically deny a signed Form 870 the status of return because the document fails two formal requirements: It does not "purport to be a return" and it does not contain a perjury clause.[11] The ruling comes to that conclusion by examining three situations that concern the interplay of sections 6020 and 6013. All three concern a hypothetical husband and wife who failed to file a return for 1999. An IRS employee is assigned to secure their return under section 6020.[12] In all three cases, the IRS employee prepares some documents and presents them to the taxpayers for signature. In all three cases, the question is whether the taxpayers have filed a return within the meaning of section 6013 to trigger the limitations on retroactive election of joint return status in section 6013(b). The important differences and conclusions are as follows:

> *Situation 1*: The taxpayers do not provide "all the information necessary" to prepare the documents and do not sign the documents prepared by the IRS employee. *Conclusion*: The documents "are not returns . . . for purposes of section 6013 because they did not sign the [documents] under penalties of perjury."

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[7]Section 6020(b).

[8]I have suggested that the proper point will generally be when the taxpayer files a petition in Tax Court in response to a 90-day letter, or else when the IRS makes an assessment when no Tax Court petition is filed. *See, e.g.*, Camp, *supra* note 1. That is the point suggested by the case law on bankruptcy discharge for nonfilers. It is also the point suggested by section 6013's restriction on the joint filing election. And it has other reasons to commend it, which are beyond the scope of today's column.

[9]Reg. section 1.6013-1(a)(1).

[10]Recall that while the Senate would have allowed a straight-up "opt out" regime in the 1998 reforms, the House wanted to stick to the traditional "innocent spouse" concept and that is basically what the Conference Committee adopted. For a detailed review of the legislative history of section 6015, see Bryan T. Camp, "The Unhappy Marriage of Law and Equity in Joint Return Liability," *Tax Notes*, Sept. 12, 2005, p. 1307.

[11]Note that the ruling, and other chief counsel documents, use the term "jurat" to mean a perjury clause. The terms are not formally synonymous, and I don't know if they are functionally synonymous. But jurat means "sworn to." A jurat clause is one in which signers swear to God (or affirm, if they are Quaker) that they are telling the truth. A perjury clause is, in effect, a secular jurat in which the signer agrees to be criminally liable for false statements.

[12]As I explained in my last column, the section 6020 process is more commonly worked through the bulk processing operations in the IRS campuses in the automated substitute for return (ASFR) program. In that process no IRS employee is assigned to secure a return. Instead, the computers attempt to secure the return using third-party information returns and the taxpayer's last known address. The 30-day letter package and 90-day letter package are automated. *See* IRM 5.18.1 (*ASFR Handbook*). Note that since my last column was published on Apr. 17, 2006, the IRS has removed the *ASFR Handbook* from its Web site. I do not know why.

Situation 2: The taxpayers do provide "all the information necessary" to prepare the documents, sign a "document prepared by the Service under the authority of section 6020(a)," and the signature is made "under penalties of perjury." *Conclusion*: The unspecified document is a return for purposes of section 6013 because it meets the four criteria listed in *Beard* including, most importantly, being "executed under penalties of perjury."

Situation 3: The taxpayers do not provide "all the information necessary" to prepare the documents, but consent "to the immediate assessment of the taxes reflected in the documents for the 1999 tax year by signing [a] Form 870," which, however, is not signed "under the penalties of perjury." *Conclusion*: The Form 870 is not a return for purposes of section 6013 because it "does not purport to be a return and it is not signed under penalties of perjury as required by section 6065." *Further conclusion*: Rev. Rul. 74-203 (which treated signed Form 870s as returns) is overruled because it "is inconsistent with *Beard* and the cases cited therein on what constitutes a valid return, because a Form 870 does not purport to be a return and is not executed under penalties of perjury." Accordingly, "A Form 870 signed by taxpayers . . . is not a return under section 6020(a). . . . This holding also applies to Form 1902 . . . and Form 4549 . . . and any successor forms to these forms, because these documents do not purport to be returns and do not contain a jurat with a penalties of perjury clause."[13]

While I have tried to give an honest and fair reading of the ruling, I ran into a couple of problems trying to understand it. One problem is that it states several times as a "fact" that the IRS employee did or did not prepare a return. But the entire legal issue is *whether* the documents used constitute a return for purposes of the section 6013 election. So to label a document in the facts as being or not being a return simply begs the *legal* question. For example, in giving the facts under Situation 3, the ruling states that the IRS employee "did not prepare a joint return and instead prepared a Form 870." Well, if one states as a fact that there was no return, that pretty much assumes the legal conclusion!

Second, the ruling is inconsistent and nonparallel in presenting the three situations. For example, in Situation 2 the ruling says the IRS employee prepared "documents authorized by section 6020(a)." In addition to assuming the legal conclusion (since section 6020(a) provides that those documents are to be "received as the return"), the ruling does not say whether the documents prepared by the IRS employee in the other two situations were or were not "authorized by section 6020(a)." It would have been more helpful if the ruling had the IRS employee prepare the same set of identified documents in each of the three situations. Similarly, while the ruling states that the taxpayers tell the IRS employee they want to file jointly in Situation 2, it is silent about whether they do so in Situation 3 or whether the IRS employee proposes to assess them on a joint or separate basis.

I have resolved the ruling's interpretive problems by reading Rev. Rul. 2005-59 in light of what appears to be its central purpose.

I have resolved those interpretive problems by reading Rev. Rul. 2005-59 in light of what appears to be its central purpose: to overrule Rev. Rul. 74-203. Accordingly, I assume that Situation 3 is meant to parallel the situation addressed in Rev. Rul. 74-203. That means I assume a couple of facts about Situation 3 that are not explicitly set out. First, since an important fact in Rev. Rul. 74-203 was that the taxpayers told the IRS employee that they wanted to file jointly, I assume that likewise in Situation 3 the taxpayers have told the IRS employee they want joint filing status and that this is reflected in the documents that accompany the Form 870.[14] Second, the ruling is strangely silent about what else accompanies the Form 870 in Situation 3. But taxpayers do not sign a Form 870 in a vacuum; it accompanies either a 30-day or 90-day letter.[15] Again, since Situation 3 is supposed to knock out Rev. Rul. 74-203, I have assumed the same facts as in that earlier ruling. In short, I have tried to resolve the internal inconsistencies and ambiguities in light of Rev. Rul. 2005-59's apparent purpose to overrule Rev. Rul. 74-203. I invite the reader to see if I missed anything.

II. Misapplication of Law

Revenue rulings "represent the conclusions of the Service on the application of the law," and their purpose is "to promote a uniform application of the tax laws."[16] I think Rev. Rul. 2005-59 misinterprets the law and fails to promote its uniform application. First, it misapplies both the legal rules it relies on: section 6065 and *Beard*. Second, it reverses over 30 years of solid legal precedents without articulating a strong legal or policy rationale for the turnaround. Third, its approach to the operation of section 6020 conflicts with the approach taken in the recently revised section 6020 regulations, creating a

[13]All quotes are from Rev. Rul. 2005-59.

[14]This assumption is strengthened by the ASFR program's automatic selection of a filing status of unmarried individuals for each taxpayer. If taxpayers want a different status, such as married filing jointly, they need to provide that necessary information in their response to the 30-day package or 90-day package. *See ASFR Handbook*. IRM 5.18.1.9.

[15]IRM 5.18.1.9.21. *See also* IRM 4.12.1.17 (May 3, 1999) ("If the nonfiler does not provide a delinquent return, all adjustments, tax, and penalties will be proposed on an income tax change report (Form 1902-B or Form 4549). If the nonfiler signs this report, it becomes a return filed by the Service under IRC 6020(a)."). No doubt the IRS will now change that last sentence to conform to Rev. Rul. 2005-59. But it should not.

[16]This is the standard language from the Introduction to the Cumulative Bulletins. *See, e.g.*, 2001-2 C.B. at ii.

goose-and-gander problem. I will explain each critique in turn (except the second one, which I covered in my last column).[17]

A. Misinterpretation of Section 6065

Rev. Rul. 2005-59 twice claims that under section 6065 a document *must* contain a perjury clause before it can be a return. It first states in the "law" section that "section 6065 *requires* that a return 'shall contain or be verified by a written declaration that it is made under the penalties of perjury'" (emphasis added). It later concludes that a Form 870 (presumably with accompanying schedules or other documents showing how the tax was determined) cannot be a return because, in part, "it is not signed under penalties of perjury *as required by section 6065*" (emphasis added).

Section 6065 reads, in full, as follows:

> Except as otherwise provided by the Secretary, any return, declaration, statement, or other document required to be made under any provision of the internal revenue laws or regulations shall contain or be verified by a written declaration that it is made under the penalties of perjury.

Rev. Rul. 2005-59 makes two mistakes regarding section 6065. First, it fails to mention, much less interpret, the meaning of the initial clause of the statute. That failure creates the misimpression that the IRS has no discretion as to whether a document must be signed with a perjury clause. Second, the ruling fails to address the meaning of the phrase "required to be made under any provision of the internal revenue laws or regulations" and so assumes without analysis that what the IRS prepares during the section 6020 substitute-for-return process falls within the ambit of section 6065. Let's look at each mistake more closely.

> ***It is disingenuous for Rev. Rul. 2005-59 to suggest that the weak words of the statute twist the mighty arms of the IRS.***

Folks, I trust I do not have to underline, italicize, bold, or highlight in neon green the very plain language of the opening clause — "Except as otherwise provided by the Secretary." It should jump right out at you. It certainly appears, on its face, to negate any claim that section 6065 binds the IRS. It seems to allow the IRS full discretion to decide which documents must be signed under penalties of perjury. The Supreme Court sure seemed to think so in *United States v. Bishop*, noting, with reference to returns prepared and filed by the taxpayer, that "the Secretary or his delegate has the power under section 6065 (a) to provide that no perjury declaration is required."[18] It is disingenuous for Rev. Rul. 2005-59 to suggest that the weak words of the statute twist the mighty arms of the IRS.

Nor does the legislative history of section 6065 suggest that the opening clause means anything less than what it plainly says. Section 6065 was enacted as part of the 1954 codification. It drew together in one statute several other provisions relating to signature requirements of various returns and documents of both individual and corporate taxpayers. Previously, some returns had to be signed under oath, others had to be signed under penalties of perjury, and still others simply had to be signed. Section 6065 was originally drafted to reflect all of those possibilities but to make signature under penalty of perjury the default rule. The section's language originated in the House bill and was unchanged by the Senate. The House and Senate reports use the same language to explain that under the consolidated statute "all returns, etc., are to be made under penalties of perjury, except that the Secretary may permit them to be made without such declaration or the Secretary may exercise his authority . . . to require them to be made under oath."[19] So what seems to be true is indeed true: The IRS has complete discretion to require or not require perjury declarations.[20]

The second interpretive problem lies in the application of section 6065 to the section 6020 process. There are two good reasons why it probably does not apply. First, as the legislative history of the statute shows, the entire statute is directed at documents required to be submitted *by*

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[17]In my previous column I detailed how, even before Rev. Rul. 74-203, the IRS and the courts took a functional approach in concluding that a signed Form 870 could constitute a section 6020(a) return. For the blow-by-blow analysis, see Camp, *supra* note 5. *Beard* was decided in 1984. After *Beard*, both the IRS and the courts continued to follow Rev. Rul. 74-203. It thus seems a bit late for Rev. Rul. 2005-59 to say, as it cheekily does, that Rev. Rul. 74-203 is "inconsistent with *Beard* and the cases cited therein."

[18]412 U.S. 346, 357 (1973) (*dicta*). Before 1976, section 6065 had two subsections.

[19]H. Rep. 1337, *reprinted in* 1954 USCCAN at 4548; S. Rep. 1662, *reprinted in* 1954 USCCAN at 5215.

[20]One might read the revenue ruling as simply declining to exercise the discretion permitted by section 6065 and invoking the default rule of a perjury declaration for the Form 870. Or reinvoking, since the IRS has ever since Rev. Rul. 74-203 consistently concluded that signed Forms 870 or like documents should be "received as the return of such person." The problem with that reading of Rev. Rul. 2005-59 is that an agency cannot exercise its discretion arbitrarily. It must provide a reasoned basis for its decision and the ruling here does not, especially in view of the clear policy reasons for adopting the contrary holding that a signed Form 870 can constitute a return, spelled out in Rev. Rul. 74-203 and in GCM 34919, 1972 LEXIS GCM 205. Once one concedes that neither section 6065 nor *Beard* compels the result as a matter of law, the ruling amounts to mere fiat. There may be good policy reasons for the ruling's position (I consider them below), but they are unexplained. That leaves Rev. Rul. 2005-59 vulnerable under the general principle of administrative law that an agency must provide a reason for the exercise of a discretionary action or else its decision will be void. *See Securities and Exchange Commission v. Chenery*, 332 U.S. 194 (1947) ("a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. . . . If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable.").

taxpayers, and not documents prepared by the IRS.[21] As I detailed in my last column, the whole history of the section 6020 return process shows that it authorizes the IRS to step in when taxpayers either cannot or will not prepare their own returns. The IRS, not the taxpayer, prepares the documents necessary to calculate the tax, and the IRS can use any documents or forms it wants to as long as the documents and forms contain "sufficient information . . . to compute the tax liability."[22] If the taxpayer provides necessary information and signs, then the signed documents are "received as the return" of the taxpayer under the plain language of section 6020(a). *That* language does not require a perjury clause. If the taxpayer does not provide necessary information or a signature, the same set of documents will comprise a section 6020(b) return.[23] Either way, because the IRS employee prepares the documents to be signed, section 6065 does not apply because the documents are not being submitted to the IRS *by the taxpayer* but are being submitted to the taxpayer by the IRS.

Second, regardless of who prepares them, the statute applies only to documents "required to be made under any provision of the internal revenue laws or regulations." Section 6020 returns are not required to be made. Courts have routinely rejected bizarre taxpayer assertions that the IRS is somehow required to prepare returns for the taxpayer under section 6020.[24] As I explained in my last column, the IRS does not have to prepare a return for nonfilers; it can simply send out the notice of deficiency. And if the IRS does prepare a substitute-for-return package, which includes the Form 870, no law or regulation "requires" the taxpayer to sign it. I suggested in my last column that the section 6020 process is best thought of as a congressional decision about when taxpayers who have initially failed in their section 6011 duty to file returns may be treated as compliant taxpayers. The basic deal is that taxpayers who give the cooperation necessary for an immediate assessment are rewarded by being treated as if they *have* fulfilled their section 6011 obligation. Taxpayers who choose to continue their contumacious ways are not treated so well. In effect, section 6020 gives taxpayers a second chance to do their section 6011 duty, but does not *require* them to take it. Section 6065 is best thought of as applying to the duty itself, not to the second chance.

One could argue that since a section 6020 return is a substitute for the required return, allows taxpayers to fulfill their section 6011 duty to file a return, and is to be received as their return, section 6065 should apply regardless of who prepares the documents. That argument has some force, but the important counterpoint for me is that the IRS itself still controls the forms used in the process. The IRS could have its employees or the computer prepare a Form 1040 and send that for the taxpayer to sign instead of a Form 870. I suspect that in field cases, local practices may vary between IRS employees filling out an actual Form 1040 for taxpayers and simply attaching a Form 870 to a revenue agent report. Heck, the IRS could put a perjury clause on the Form 870. But to decide whether a taxpayer has filed a return based on which form the IRS has chosen to send the taxpayer seems to me excessive formalism.

> ***In effect, section 6020 gives taxpayers a second chance to do their section 6011 duty, but does not require them to take it.***

In sum, Rev. Rul. 2005-59's claim that section 6065 requires signatures to be made under penalty of perjury before *any* document can be a return is weak. Section 6065 does not really support, much less compel, a conclusion that a document (a) *prepared by the IRS* (b) *during the section 6020 process*, may not be, according to the plain terms of that statute, "received as the return of such person" if the conditions in section 6020 are met. A perjury declaration is not one of the conditions. Even if it were, the IRS can waive that requirement and it is not clear that a single revenue ruling will suffice to recant the 30-year history of waiver that I discussed in detail in my last column.[25]

B. Misinterpretation of *Beard*

Rev. Rul. 2005-59 also invokes *Beard* to conclude that a signed Form 870 cannot be a section 6020(a) return. The ruling claims that *Beard* requires a document to "purport to be a return." It points out that Form 870 does not purport to be a return because, on its face, it is just a waiver of restriction on immediate assessment. It then concludes that Form 870 fails to qualify as a return. I think that logic is suspect and unsupported by *Beard*. The "purport to be a return" test is not about whether a document is labeled "return" but is about whether a document *functions* as a return. That is particularly true in the context of the section 6020 substitute-for-return process. To conclude that a document is not a return when it is used by the IRS to function as one, places form over function. I will review *Beard* and then explain how Rev. Rul. 2005-59 misapplies it.

1. Untangling *Beard*. *Beard* was a case in which a taxpayer submitted altered Forms 1040 to reflect his tax protestor theories.[26] At issue was whether the IRS had correctly applied the section 6651(a)(1) additions to tax

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[21]*See, e.g., Morelli v. United Alexander*, 920 F. Supp. 556, *Doc 96-14968, 96 TNT 99-59* (S.D.N.Y. 1996) (collecting cases).

[22]*Millsap v. Commissioner*, 91 T.C. 928, 930 (1988).

[23]*Id.*

[24]*Morelli, supra* note 21; *In re Vines*, 200 B.R. 940, *Doc 96-7271, 96 TNT 49-10* (M.D. Fla. 1996) (collecting cases); *United States v. Harrison*, 72-2 USTC para. 9573 (S.D.N.Y. 1972) (Weinstein, J.) (prescient discussion of automation's effect on section 6020 process).

[25]Rev. Rul. 2005-59 does not cite *Beard* for the proposition that the taxpayer must sign a document under penalties of perjury. I assume, however, that would be an alternative basis that the ruling would take if section 6065 were unavailable. Accordingly, I will address that issue during my discussion of *Beard*.

[26]*Beard v. Commissioner*, 82 T.C. 766 (1984).

for failure to file a return. Deciding the issue required the Tax Court to rule on whether the altered Forms 1040 constituted returns so as to prevent the additions to tax.

While "everyone knows" that the Tax Court applied a four-part test in *Beard*, a fresh reading of the case reveals that it actually employed a two-step analysis to answer the question presented. It first looked to see whether the altered forms were returns within the meaning of the applicable regulations. Only then did it apply the now-famous four-part test.

The Tax Court's first step was to see whether the taxpayer had fulfilled his section 6011 duty to file returns by following the section 6011 regulations.[27] It emphasized *function*: The purpose of the "proper official form" was "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."[28] After establishing the reason for requiring taxpayers to conform to the rules written by the IRS, the court then looked at whether Beard had submitted "a return *according to the forms and regulations* prescribed by the Secretary as required by section 6011(a)." It concluded he had not.[29]

But the court did not stop there. It took a second step: looking to see whether the altered Form 1040s could be returns under a line of (mostly) Supreme Court cases concerning:

> factual circumstances in which the courts have treated as returns, for statute of limitations purposes, documents which did not conform to the regulations as prescribed by section 6011(a). Since the instant case is one of first impression, we will consider these cases that were decided on the statute of limitations issue because a return that is sufficient to trigger the running of the statute of limitation must also be sufficient for the purpose of section 6651(a)(1).

The court then synthesized the "factual circumstance" cases into a four-part test:

> 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.[30]

This review of *Beard* reveals how Rev. Rul. 2005-59 may have committed two errors in relying on the "purport to be a return" element of the *Beard* four-part test. First, one does not even get to that test unless the documents under consideration fail to conform to the applicable rules and regulations. If the documents at issue meet the requirements of the IRS, they are returns. Second, even if one applies the four-part test, one should not read the "purport to be a return" element in isolation from the rest of the elements. I shall discuss each error in turn.

The Office of Chief Counsel has long recognized that the rules and regulations governing forms selected and used by taxpayers do not apply to forms selected and used by the IRS.

2. *Beard* four-part test does not apply. *Beard's* four-part test is inapplicable to Forms 870 used in the section 6020 process. *Beard* was about whether documents *prepared by the taxpayer* conformed to the rules and regulations promulgated by the IRS. But the section 6020 process is about documents *prepared by the IRS*. I submit that is an important distinction. In other words, the first step in *Beard* is to ask whether the document in question conforms to the IRS requirements for returns. In the section 6020 process, the Form 870, almost by definition, does conform to the IRS requirements. Taxpayers do not select the forms; the IRS selects the forms, which creates a strong presumption that the forms conform to the IRS requirements for a return. The Office of Chief Counsel has long recognized that the rules and regulations governing forms selected and used by taxpayers do not apply to forms selected and used by the IRS. The reason is purely functional, as GCM 34673 explained in 1971:

> It would be employing our own rules to restrict the reasonable and feasible administration of the tax laws for the Service to conclude that in preparing a return under the requirements of section 6020(b)(1) the return must be prepared in the fashion and on the form designed for taxpayers. The forms designed for taxpayer use were intended to provide a convenient method of setting out the required information in relation to the type of records that the taxpayer is expected and required to maintain. The same information may not be available to the Service upon audit, or at least not in the same form; thus, a different mode or form of presentation of the information required to arrive at the proper tax liability may be more convenient to the Service. When a taxpayer fails to file an employment tax

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[27]Reg. section 1.6011-1(a).

[28]82 T.C. at 775, *quoting Commissioner v. Lane-Wells Co.*, 321 U.S. 219, 223 (1944) (emphasis supplied by Tax Court). The Tax Court then quoted this passage from *Parker v. Commissioner*, 356 F.2d 792, 800 (8th Cir. 1966): "Taxpayers are required to file timely returns on forms established by the Commissioner. * * * The Commissioner is certainly not required to accept any facsimile the taxpayer sees fit to submit. If the Commissioner were obliged to do so, the business of tax collecting would result in insurmountable confusion."

[29]82 T.C. at 777 ("There can be no doubt that due to its lack of conformity to the official form, it substantially impedes the Commissioner's physical task of handling and verifying tax returns. Under the facts of this case, taxpayer has not made a return *according to the forms and regulations* prescribed by the Secretary as required by section 6011(a)" (emphasis in original)).

[30]82 T.C. at 777.

return, the Service is required to gather the information essential to determine and collect the tax from the non-filing taxpayer. In this situation, it is illogical to conclude that the Service, in preparing a section 6020(b) employment tax return, must use Form 941 for that purpose when the same function can be served by using a different procedure.

While that general counsel memorandum concerns an employment tax and the definition of a section 6020(b) return, the IRS adopted the same rationale in situations involving the preparation of a section 6020(a) return for income tax.[31] The rationale is a good one, consistently used by the Office of Chief Counsel over the years, but it is one that Rev. Rul. 2005-59 completely fails to address.

Tax Court cases on section 6020(b) returns support that IRS analysis. The Tax Court itself has not applied *Beard* to judge whether documents prepared *by the IRS* during the examination and deficiency process constitute returns.[32] In deciding whether documents prepared by the IRS constituted section 6020(b) returns, the court has instead relied on a strongly functional analysis in a string of cases going back to *Phillips v. Commissioner*, decided in 1986, two years after *Beard*.[33] Those cases make no mention of *Beard* and instead test whether a document is a section 6020(b) return by looking to see how closely it is associated with the underlying documents from which a tax liability can be computed (and whether it meets the section 6020(b) signature requirement).[34]

As one Tax Court judge has noted, *Beard* simply does not apply "in some circumstances where the statutory scheme directs a different inquiry."[35] Like section 6020(b), section 6020(a) is most reasonably read as directing such a different inquiry because it expressly requires only that the taxpayer (1) "consent to disclose all information necessary" and (2) sign "such return." The rules and regulations governing *taxpayer*-prepared documents do not apply in the same way to IRS-prepared documents. Thus, the *Beard* inquiry is simply inappropriate in this context.

3. Form 870 meets the *Beard* four-part test. Even if one concluded that *Beard* applied to forms selected, prepared, and presented to the taxpayer by the IRS during the section 6020 process, Rev. Rul. 2005-59 misapplies the four-part test by reading the "purport to be a return" element as a formal element in isolation from the other elements. It is not a formal element. It is a functional element. And it is just one of four. Recall that the Tax Court reached the four-part test only *after* it had already decided that Beard's return was not proper "according to the forms and regulations." That first step was the formal test. Did the taxpayer use the right forms? If yes, end of story. If no, proceed to the four-part test. Once one applies a functional analysis, then, for the reasons I detailed in my last column, one easily reaches the same conclusion that the IRS and case law have reached for over 30 years, that the signed Form 870 constitutes a section 6020(a) return and should therefore be "received as the return of the taxpayer."

> ***The Tax Court itself has not applied Beard to judge whether documents prepared by the IRS during the examination and deficiency process constitute returns.***

But even if one reads "purport to be a return" as a formal element, it alone is neither necessary nor sufficient to determine whether a particular document is a return. It must be read with the other elements. *Beard* itself shows how it is not sufficient. The taxpayer there argued that what he had submitted to the IRS was labeled a Form 1040 and so it purported to be a return. The Tax Court agreed that the document *did* purport to be a return because it was titled "Form 1040," but it was still not a return because he had altered it so much that it could not *function* as a Form 1040. Thus, the taxpayer had not made an honest and reasonable attempt to satisfy the requirements of the tax law. On this view, the functional analysis of the "honest and reasonable" element trumped the formal "purport to be a return" element.

The Supreme Court cases cited in *Beard* demonstrate how the "purport to be a return" element is also not necessary to a finding that a document is a return within the meaning of the applicable statute. In *Germantown Trust v. Commissioner*, the Supreme Court had held that a return filed on one form in a good-faith belief that the taxpayer was one type of entity (trust) could start the limitation period — if it contained the information necessary to calculate tax — even if the IRS later determined that the taxpayer was another type of entity (corporation)

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[31]GCM 34919, 1972 GCM LEXIS 205 at *4 (relying on GCM 34673 to conclude, "A Service-prepared return need not be on the forms prescribed for use when a taxpayer prepares his own return."); GCM 38627, 1981 GCM LEXIS 107 at *10 (relying on GCM 34673 to conclude, "Thus we would draw a distinction between returns prepared by the taxpayer and those prepared by the Service. The basis for this distinction is explained in GCM 34673 and relied upon in GCM 34919. Though GCM 34673 concerns returns prepared and executed pursuant to section 6020(b), rather than section 6020(a), the following analysis of that memorandum applies equally to returns prepared under the latter section.").

[32]*See Spurlock v. Commissioner*, T.C. Memo. 2003-124, *Doc 2003-10782, 2003 TNT 83-10*, 2003 Tax Ct. Memo. LEXIS 123 at *41.

[33]86 T.C. 433 (1986), *aff'd*, 851 F.2d 1492 (D.C. Cir. 1988) (no reference to *Beard*). *See also Cabirac v. Commisioner*, 120 T.C. 163, *Doc 2003-10230, 2003 TNT 78-10* (2003) (no reference to *Beard*); *Millsap v. Commissioner*, 91 T.C. 926 (1988) (no reference to *Beard*).

[34]It is true that Judge Vasquez has recently suggested applying *Beard* to judge whether documents prepared during the section 6020 process were returns. *See, e.g., Mendes v. Commisioner*, 121 T.C. 308, 329, *Doc 2003-26296, 2003 TNT 239-9* (2003) (Vasquez, J., concurring). But once again, his opinion deals with documents prepared and submitted *by taxpayers* on Forms 1040 during the section 6020 process.

[35]*Mendes v. Commissioner*, 121 T.C. 308, 332 (2003) (Goeke, J., concurring).

and so had used the wrong form.[36] One might interpret *Germantown* as meaning that the "purport to be a return" element is functional — the wrong form was a return because it was meant to function as a return and it *did* function as a return (because it contained all the necessary data). Or one might interpret *Germantown* as meaning that the "honest and reasonable" element trumped the "purport to be a return" element. Either way, the form yields to function.

The Tax Court has applied this idea of function over form in other contexts as well. For example, the IRS requires charities to report unrelated business income on Form 990-T. Nonetheless, the Tax Court has held that a Form 990 will suffice to start the assessment limitations period when an organization in good faith reports income on a Form 990 and the IRS later determines it is unrelated business income.[37]

But wait! What about that perjury clause? After all, another one of the elements in the *Beard* four-part test is that, to be a return, the document should be signed under penalties of perjury. At first blush, that appears a slam-dunk formal requirement. A closer reading, however, shows that the element is directly tied to statute law; it is not an independent requirement created by the courts. The *Beard* formulation is simply a restatement of the various rules stated over time by the Supreme Court. The Tax Court pulled the perjury clause rule from the Supreme Court's 1934 opinion in *Zellerbach v. Helvering*, which, in turn, pulled it from the 1930 opinion in *Lucas v. Pilliod Lumber Co.*[38] That last case, however, pulled the signature-under-oath requirement *from the then-governing statute*![39] Accordingly, the signature requirement in *Beard* simply comes from statute law and is not a judicially created rule. As I explained above, the current statute governing the signing of returns — section 6065 — gives the IRS complete discretion on what type of signature to require. It is true that the taxpayer must sign a document.[40] That is because section 6020(a) does indeed require a signature. But it does not require a perjury clause.

For these reasons I think Rev. Rul. 2005-59's reading of *Beard* is wrong. The *Beard* four-part test is not meant to be a mechanical formalist test. How that test was used in *Beard* demonstrates that it was meant as a functional backup analysis to the primary inquiry of whether the document at issue conforms to the applicable rules and regulations *for documents submitted by the taxpayer*. Proper application of *Beard* should not change in any way the IRS's 30 years of rulings that a signed Form 870 constitutes a section 6020(a) return when it functions as a return.

C. The Section 6020 Regulations

The position staked out by Rev. Rul. 2005-59 appears to be that the taxpayer must prepare, sign, and send in a Form 1040, or somehow sign a Form 1040 during the section 6020 process to be considered to have filed a return. That position does not promote the uniform application of the laws because it directly contradicts the position the IRS takes on what constitutes a section 6020(b) return.

Recall that during the section 6020 process, the IRS will send out either a 30-day package or a 90-day package to the taxpayer. That package consists of a report that proposes a deficiency and explains the basis for the proposed deficiency. It also consists of a consent form, usually the Form 870, for the taxpayer to sign if the taxpayer agrees with all the proposed items. If the taxpayer disagrees, the taxpayer can either fill out a Form 1040 or contact an IRS employee who will revise the report per the information provided by the taxpayer. Because the default filing status used by the automated substitute for return (ASFR) program is that of an unmarried individual, married taxpayers often will need to contact the IRS to get the filing status changed.[41] Thus, in the situations described in Rev. Ruls. 2005-59 and 74-203, one can say with great confidence that the taxpayers have supplied "necessary" information to the IRS: their filing status election.

As I explained at length in my last column, when a taxpayer does not respond to the proposed deficiency (either the 30-day letter or the 90-day letter), it is difficult to tell whether the IRS has prepared a section 6020(b) return or has chosen simply to proceed against the taxpayer with a notice of deficiency. The IRS has had

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[36]*Germantown Trust v. Commissioner*, 309 U.S. 304 (1940) (a taxpayer's erroneous but good-faith filing of a fiduciary return instead of a corporate return was valid to start the limitation period for assessment of corporate income tax). *Cf. Commissioner v. Lane-Wells*, 321 U.S. 219 (1944) (regular corporate income tax return of a taxpayer was not valid to start the limitation period for assessment of separate personal holding company tax because the regular return did not contain the information needed to calculate the latter tax). Congress showed a preference for the functional *Germantown Trust* approach by enacting section 6501(g) to overrule several cases that had followed the rule laid down in *Lane-Wells*. *See* GCM 38382; 1980 GCM LEXIS 236 (May 23, 1980) (giving legislative history of section 6105(g)(2)).

[37]*California Thoroughbred Breeders Ass'n. v. Commissioner*, 47 T.C. 335 (1966), *acq. in result only*, 1969-1 C.B. 21. There, the Tax Court liberally construed section 6501(g)(2) to hold that the filing of a Form 990 would start the running of the period of limitations with respect to the tax on unrelated business income, even though Form 990 was not the proper "prescribed return form" per reg. section 1.6011-1(b). The IRS agreed to follow the Tax Court's functional approach in Rev. Rul. 69-247, 1969-1 C.B. 303, but was careful to limit its agreement to situations in which the taxpayer has disclosed sufficient facts on the improper form to alert the IRS of the potential existence of unrelated business taxable income.

[38]*Zellerbach* is at 293 U.S. 172 and *Pilliod Lumber* is at 281 U.S. 245.

[39]281 U.S. at 248, *citing* to section 239 of the Revenue Act of 1924, c. 234, 43 Stat. 253 ("That the so-called return of May 31, 1919, unsupported by oath, did not then meet the definite

(Footnote continued in next column.)

requirements of Section 239 is manifest."). Taxpayers were required by statute to sign returns under oath until 1942, 56 Stat. 798, 836, when the requirement was downgraded to a perjury clause and then, in 1954, became the discretion of the IRS.

[40]*See, e.g., In re Wright*, 244 B.R. 451, *Doc 2000-3500, 2000 TNT 25-19* (Bankr. N.D. Cal. 2000) (no section 6020(a) return when taxpayer cooperated with preparation and assented but never signed a waiver form).

[41]*See ASFR Handbook* at IRM 5.1.18.

some recent trouble convincing the Tax Court that a notice of deficiency was based on a section 6020(b) return.[42] In the 1970s the Office of Chief Counsel warned the commissioner about the difficulty in distinguishing between a bare notice of deficiency and a notice of deficiency based on a section 6020(b) return.[43] I explained in my last column how the distinction is an accident of legal history, with no real substantive purpose. But there it is. The Tax Court has therefore had to come up with some distinction between an assessment based on some mythical creature called a section 6020(b) return and an assessment based on an unagreed notice of deficiency — and it has rejected the IRS's assertion that the entire administrative file can be the section 6020(b) return.

In 2005, in reg. section 301.6020-1T, the IRS addressed the issue of what constitutes a section 6020(b) return.[44] To create a test that would meet the processing demands of tax administration and give some formal indication of a section 6020(b) return, the regulation provides that *any* set of documents will be a section 6020(b) return if the documents (a) contain sufficient information from which to compute the taxpayer's tax liability and (b) are certified as such by a Form 13496, "IRC Section 6020(b) Certification," or "*any* other form that an authorized internal revenue officer or employees signs and uses to identify a set of documents . . . as a section 6020(b) return."[45]

Notice what the IRS is doing here. The regulation not only allows the IRS to use a special form to identify a set of documents as constituting a section 6020(b) return, but it also provides that *any other* form an IRS employee uses for the same function will suffice. The regulation is very careful to emphasize that many different forms may accomplish the same function. It is also careful to emphasize that the supposed signature of the IRS employee can be "mechanically affixed" and that both the "document and signature may be in written or electronic form." In other words, that allows the IRS to automate the authentication process by creating another computer-generated document in the ASFR 30-day and 90-day packages so that they will constitute a section 6020(b) return if a taxpayer does not or cannot timely respond to them. And that is so even though these documents are potentially prepared (as they can and should be) with no human intervention. The regulation provides for that because that is what the IRS needs to make the ASFR work. The form follows function.

Rev. Rul. 2005-59 is inconsistent with the approach taken in the regulations for section 6020(b) returns. It demands that a taxpayer who responds to a 30-day or 90-day package from the ASFR actually fill out a Form 1040. Simply corresponding with or contacting the IRS and then signing the accompanying Form 870 to consent to the tax will not suffice. Just as the Form 870 does not formally "purport to be a return" on its face, neither does a notice of deficiency. But whereas the IRS allows itself huge flexibility on how to designate a notice of deficiency or accompanying documents as section 6020(b) returns, it does not allow taxpayers who timely cooperate the benefit of having those same documents "received as the return of the taxpayer" under section 6020(a).

So under Rev. Rul. 2005-59, taxpayers are at the mercy of whatever an IRS employee decides to prepare and send them. That gets the section 6020 regime exactly backward.

The potential upshot of the interplay between reg. section 301.6020-1T and Rev. Rul. 2005-59 is that taxpayers who cooperate, who provide information, and yet who merely sign the Form 870, will now be forever adjudged nonfilers because of the IRS's new standard operating procedure to designate the 30-day letter or 90-day letter package as a section 6020(b) return. What is good for the IRS goose is apparently not good for the taxpayer gander. But it should be.

III. Tax Administration Policy

Operationally, Rev. Rul. 2005-59 may well result in diverse applications of the section 6020 return process, to the detriment, in at least three ways, of many taxpayers. First, and most obviously, taxpayers are now at the mercy of the IRS. Whether what the IRS does will be received as the return of the taxpayer under section 6020(a) or will be received as a section 6020(b) return will *not* depend on the cooperation and participation of the taxpayer as much as on the selection of forms that the IRS happens to send the taxpayer. Presumably, the IRS will alter the ASFR 30-day and 90-day packages to include a Form 1040 instead of a Form 870. One should hope, although I have seen no indication that this change will happen or is happening. But even if it does, there are still a lot of substitutes-for-return that get worked in the field. And field procedure is notoriously local. So under Rev. Rul. 2005-59, taxpayers are at the mercy of whatever an IRS employee decides to prepare and send them. That gets the section 6020 regime exactly backward. Section 6020 is not about IRS behavior; it is about taxpayer behavior. Taxpayers who cooperate sufficiently with the IRS and allow the IRS to "help . . . them meet . . . their tax responsibilities" should be rewarded under section 6020(a). The previous IRS functional approach to that section accomplished that result more effectively than does this new formalist approach.

Of course, as you read this the IRS has not yet changed its ASFR programming. That will take months and perhaps years. Meanwhile, taxpayers who sign Forms 870 instead of filling out and sending in their own Forms 1040 will (at least according to the IRS) be stuck with a section 6020(b) return. In November 2005 the Office of Chief Counsel announced that it would now follow Rev.

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[42]*See, e.g., Cabirac v. Commissioner*, 120 T.C. 163 (2003) (denying the section 6651(a)(2) addition to tax because the IRS has not prepared a section 6020(b) return); *Spurlock v. Commissioner*, T.C. Memo. 2003-124 (same). The IRS difficulties in this regard go back to at least *Phillips v. Commissioner*, 86 T.C. 433 (1986).

[43]GCM 35487, 1973 GCM LEXIS 109 (Sept. 21, 1973).

[44]The IRS published simultaneous temporary and proposed rules. The temporary rules are at 70 *Fed. Reg.* 41144 (July 18, 2005); the proposed rules are at 40 *Fed. Reg.* 41165.

[45]Reg. section 301.-6020-1T(b)(2) (emphasis supplied).

Rul. 2005-59 in bankruptcy cases for taxpayers who signed Form 870 after September 12, 2005.[46] So taxpayers who would have had old tax liabilities discharged in bankruptcy now will be unable to receive a discharge — assuming courts follow Rev. Rul. 2005-59, which I sure hope they won't.

Second, and worse, when the tax liability proposed by the IRS is correct and the taxpayer has no information to add — because the IRS was already in possession of all the relevant information, thanks to third-party information returns — the taxpayer is now stuck with a section 6020(b) return. Even if the IRS now starts sending out Form 1040 with the 30-day notice packages and the 90-day notice packages, that does not address this issue. Previous case law and IRS guidance focused on whether the taxpayer had any "necessary" information to provide. If not, it was simply the consent to assessment that allowed the document to be treated as a section 6020(a) return.[47] I think that is the proper position and should remain so.

Third, there does not appear to be a strong policy reason to require a perjury clause during the substitute-for-return process, whether on the Form 870 or any other form. A perjury clause requirement serves at most three purposes: deterring taxpayers from playing the audit lottery by emphasizing to the taxpayer the seriousness of what is being signed; assuring the IRS that the return provides a substantially correct basis for assessment; and providing a predicate for criminal prosecution under section 7601.[48]

None of those reasons apply in the section 6020 substitute-for-return process, which is very much like an audit. The process is more like an examination than it is like a simple return processing. The IRS uses third-party information returns such as Forms 1099 and W-2, leaving little room to omit income items. For deduction items, the taxpayer bears the burden to verify, to the satisfaction of the IRS employee, any deduction items claimed during the substitute-for-return process.[49] Form 870 and others like it are presented *to* the taxpayer by the IRS, which does not ask, "Is this correct?" but asks, "Will you consent to this?" The IRS has already prepared the report based on the information at hand, including any information provided by the taxpayer. The question "Will you consent to this?" is the final chance for the taxpayer to meet the section 6011 duty. If the taxpayer consents, and has supplied any "necessary" information, then section 6020(a) — as historically interpreted — deems that good enough to treat the documents as the taxpayer's return. There seems little reason to ask for more.[50]

Nor does the lack of a perjury clause prevent the IRS from criminally prosecuting a taxpayer who signs the Form 870 knowing the information being consented to is false. Although section 7601(a) makes a perjury clause a prerequisite for prosecution for some false statements, and so might be unavailable, the government has other criminal statutes in its arsenal, notably section 7201 or 18 U.S.C. section 1001.[51]

The final point on administration is that Rev. Rul. 2005-59 does not appear to help taxpayers fulfill their responsibilities, which the history of section 6020 suggests is one of its main purposes. As far as married nonfilers go, some might say it can help one spouse who later wants to file a Form 1040 to claim the status of unmarried individual when he or she had previously cosigned a Form 870 agreeing to be assessed as joint filers. Since the signing of a Form 870 is now not a return, the spouse will now not have been deemed to have elected the joint filing status. That was the situation in *United States v. Olgeirson*.[52] But because there will still be a prior assessment against that spouse — and now one based on a section 6020(b) return — I seriously doubt either the courts or the IRS will agree that a later-filed Form 1040 will constitute a return. The long-standing IRS position — widely adopted by the courts — is that a taxpayer can no longer file a valid return once the IRS has made the assessment on the basis of a section 6020(b) return. That was the subject of the debate between Judges Posner and Easterbrook that I discussed in a previous column.[53] The previous assessment will now have been

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[46]Chief Counsel Notice 2006-002, *Doc 2005-24052, 2005 TNT 229-6*.

[47]As one chief counsel memo explained: "Although [case law and previous IRS guidance] can be viewed as indicating that taxpayer should be the source of the information permitting the Service to calculate the liability, *Olgeirson* and *Carapella* concluded that as long as the Service has the information, regardless of the source, that part of the requirement is satisfied. We believe the courts will be inclined to follow the *Olgeirson* rationale and therefore a Form 870 signed by the taxpayer and as to which the Service has sufficient information to calculate the tax liability is, or will be held to be, a 6020(a) return for purposes of dischargeability." Memorandum to District Counsel, Seattle, from Chief, Branch 2, General Litigation Division, dated June 20, 1990, as reported in General Litigation Bulletin 358 (July 1990), 1990 GLB LEXIS 5 at *38.

[48]*Borgeson v. United States*, 757 F.2d 1071 (10th Cir. 1985) (failure to sign perjury clause on Form 1040 is sufficient predicate for section 6702 frivolous return penalty and necessary predicate for section 7601 false return criminal charge). *See also Schneider v. United States*, 594 F. Supp. 611 (E.D. Mich. 1984) (perjury penalty deters taxpayers from playing the audit lottery); *Lange v. Commissioner, Doc 2005-15332, 2005 TNT 138-10*, T.C. Memo. 2005-176 (alterations to perjury clause that called into question the accuracy or completeness of the figures reported invalidated the return, but alterations such as "under protest" that simply disclaimed liability did not invalidate returns) (collecting cases).

[49]The Internal Revenue Manual contains multiple and detailed instructions on how IRS employees working the ASFR program are to handle taxpayers who send in correspondence claiming deductions and denying the accuracy of the information returns. *See* IRM 5.18.1.9.124. They are to kick over to various examination functions any claims of itemized deductions or Schedule C or Schedule E items.

[50]If a taxpayer prepares and submits a return form, such as the Form 1040, which contains a perjury clause, during the section 6020 process, then the issue becomes moot.

[51]*Cohen v. United States*, 201 F.2d 386 (9th Cir.), *cert denied*, 345 U.S. 951 (1953) (section 7601 does not supercede 18 U.S.C. section 1001).

[52]284 F. Supp. 655 (D. N.D. 1968).

[53]*See* Camp, *supra* note 1.

made based on a section 6020(b) return, per the new regulation. So what the IRS takes with one hand it does not seem to give back with the other hand, to either spouse.

IV. Conclusion

The history of tax administration and the relevant decisions of courts and the IRS show that the basic rationale for the disparate treatment of section 6020(a) returns and section 6020(b) returns comes down to one idea: timely cooperation. As I hope I have convinced you in my previous columns, whether a taxpayer has filed a section 6020(a) return or not should turn on the behavior of taxpayers, not the IRS. That is how the courts and the IRS have interpreted the statute for over 30 years. Rev. Rul. 2005-59 is a formalist departure from that functionalist interpretation. In my opinion it misapplies the relevant law and, read in conjunction with the newly issued section 6020 regulations, interprets the statute exactly backward. The IRS now wants to distinguish between a section 6020(a) return and section 6020(b) return on the basis of the decisions made by IRS employees on what forms to ask the taxpayers participating in the substitute-for-return process to sign. Whether those are bulk processing decisions made by upper-level National Office employees that affect all taxpayers in the ASFR, or individualized processing decisions made on the ground by field employees, the result is the same: The status of a document as a section 6020(a) return or section 6020(b) return is now a matter of the form used and not the function fulfilled. I do not think that new position is either a good reading of the law or good tax administration policy.