

(ii) No executor or administrator has been appointed at or before the time of making such joint return; and

(iii) No executor or administrator is appointed before the last day prescribed by law for filing the return of the surviving spouse.

These conditions are to be applied with respect to the return for each of the taxable years of the decedent for which a joint return may be made if more than one such taxable year is involved. Thus, in the case of husband and wife on the calendar year basis, if the wife dies in February 1957, a joint return for the husband and wife for 1956 may be made if the conditions set forth in this subparagraph are satisfied with respect to such return. A joint return also may be made by the survivor for both himself and the deceased spouse for the calendar year 1957 if it is separately determined that the conditions set forth in this subparagraph are satisfied with respect to the return for such year. If, however, the deceased spouse should, prior to her death, make a return for 1956, the surviving spouse may not thereafter make a joint return for himself and the deceased spouse for 1956.

(4) If an executor or administrator is appointed at or before the time of making the joint return or before the last day prescribed by law for filing the return of the surviving spouse, the surviving spouse cannot make a joint return for himself and the deceased spouse whether or not a separate return for the deceased spouse is made by such executor or administrator. In such a case, any return made solely by the surviving spouse shall be treated as his separate return. The joint return, if one is to be made, must be made by both the surviving spouse and the executor or administrator. In determining whether an executor or administrator is appointed before the last day prescribed by law for filing the return of the surviving spouse, an extension of time for making the return is included.

(5) If the surviving spouse makes the joint return provided for in subparagraph (3) of this paragraph and thereafter an executor or administrator of the decedent is appointed, the executor or administrator may disaffirm such joint return. This disaffirmance, in

order to be effective, must be made within one year after the last day prescribed by law for filing the return of the surviving spouse (including any extension of time for filing such return) and must be made in the form of a separate return for the taxable year of the decedent with respect to which the joint return was made. In the event of such proper disaffirmance the return made by the survivor shall constitute his separate return, that is, the joint return made by him shall be treated as his return and the tax thereon shall be computed by excluding all items properly includible in the return of the deceased spouse. The separate return made by the executor or administrator shall constitute the return of the deceased spouse for the taxable year.

(6) The time allowed the executor or administrator to disaffirm the joint return by the making of a separate return does not establish a new due date for the return of the deceased spouse. Accordingly, the provisions of sections 6651 and 6601, relating to delinquent returns and delinquency in payment of tax, are applicable to such return made by the executor in disaffirmance of the joint return.

(e) *Return of surviving spouse treated as joint return.* For provisions relating to the treatment of the return of a surviving spouse as a joint return for each of the next two taxable years following the year of the death of the spouse, see section 2 and § 1.2-2.

[T.D. 6500, 25 FR 12108, Nov. 26, 1960, as amended by T.D. 7274, 38 FR 11345, May 7, 1973; T.D. 7670, 45 FR 6929, Jan. 31, 1980]

§ 1.6013-2 Joint return after filing separate return.

(a) *In general.* (1) Where an individual has filed a separate return for a taxable year for which a joint return could have been made by him and his spouse under section 6013(a), and the time prescribed by law for filing the return for such taxable year has expired, such individual and his spouse may, under conditions hereinafter set forth, make a joint return for such taxable year. The joint return filed pursuant to section 6013(b) shall constitute the return of the husband and wife for such year, and all payments, credits, refunds, or other repayments, made or allowed

with respect to the separate return of either spouse are to be taken into account in determining the extent to which the tax based on the joint return has been paid.

(2) If a joint return is made under section 6013(b), any election, other than the election to file a separate return, made by either spouse in his separate return for the taxable year with respect to the treatment of any income, deduction, or credit of such spouse shall not be changed in the making of the joint return where such election would have been irrevocable if the joint return had not been made. Thus, if one spouse has made an irrevocable election to adopt and use the last-in, first-out inventory method under section 472, this election may not be changed upon making the joint return under section 6013(b).

(3) A joint return made under section 6013(b) after the death of either spouse shall, with respect to the decedent, be made only by his executor or administrator. Thus, where no executor or administrator has been appointed, a joint return cannot be made under section 6013(b).

(4) A nonresidential alien treated as a resident under section 6013 (g) or (h) for any taxable year ending on or after December 31, 1975, and the alien's U.S. citizen or resident spouse may file a joint return for that taxable year, even though one or both of the spouses have previously filed separate returns for that taxable year. In this case, the rule in paragraph (a)(3) of this section does not apply.

(b) *Limitations with respect to making of election.* A joint return shall not be made under section 6013(b)(1) with respect to a taxable year:

(1) Beginning on or before July 30, 1996, unless there is paid in full at or before the time of the filing of the joint return the amount shown as tax upon such joint return; or

(2) After the expiration of three years from the last day prescribed by law for filing the return for such taxable year determined without regard to any extension of time granted to either spouse; or

(3) After there has been mailed to either spouse, with respect to such taxable year, a notice of deficiency under

section 6212, if the spouse, as to such notice, files a petition with the Tax Court of the United States within the time prescribed in section 6213; or

(4) After either spouse has commenced a suit in any court for the recovery of any part of the tax for such taxable year; or

(5) After either spouse has entered into a closing agreement under section 7121 with respect to such taxable year, or after any civil or criminal case arising against either spouse with respect to such taxable year has been compromised under section 7122.

(c) *When return deemed filed; assessment and collection; credit or refund.* (1) For the purpose of section 6501, relating to the period of limitations upon assessment and collection, and section 6651, relating to delinquent returns, a joint return made under section 6013(b) shall be deemed to have been filed, giving due regard to any extension of time granted to either spouse, on the following date:

(i) Where both spouses filed separate returns, prior to making the joint return under section 6013(b), on the date the last separate return of either spouse was filed for the taxable year, but not earlier than the last date prescribed by law for the filing of the return of either spouse;

(ii) Where only one spouse was required and did file a return prior to the making of the joint return under section 6013(b), on the date of the filing of the separate return, but not earlier than the last day prescribed by law for the filing of such return; or

(iii) Where both spouses were required to file a return, but only one spouse did so file, on the date of the filing of the joint return under section 6013(b).

(2) For the purpose of section 6511, relating to refunds and credits, a joint return made under section 6013(b) shall be deemed to have been filed on the last date prescribed by law for filing the return for such taxable year, determined without regard to any extension of time granted to either spouse for filing the return or paying the tax.

(d) *Additional time for assessment.* In the case of a joint return made under section 6013(b), the period of limitations provided in sections 6501 and 6502

shall not be less than one year after the date of the actual filing of such joint return. The expiration of the one year is to be determined without regard to the rules provided in paragraph (c)(1) of this section, relating to the application of sections 6501 and 6651 with respect to a joint return made under section 6013(b).

(e) *Additions to the tax and penalties.*

(1) Where the amount shown as the tax by the husband and wife on a joint return made under section 6013(b) exceeds the aggregate of the amounts shown as tax on the separate return of each spouse, and such excess is attributable to negligence, intentional disregard of rules and regulations, or fraud at the time of the making of such separate return, there shall be assessed, collected, and paid in the same manner as if it were a deficiency an additional amount as provided by the following:

(i) If any part of such excess is attributable to negligence, or intentional disregard of rules and regulations, at the time of the making of such separate return, but without any intent to defraud, this additional amount shall be 5 percent of the total amount of the excess.

(ii) If any part of such excess is attributable to fraud with intent to evade tax at the time of the making of such separate return, this additional amount shall be 50 percent of the total amount of the excess. The latter addition is in lieu of the 50 percent addition to the tax provided in section 6653(b).

(2) For purposes of section 7206 (1) and (2) and section 7207 (relating to criminal penalties in the case of fraudulent returns), the term "return" includes a separate return filed by a spouse with respect to a taxable year for which a joint return is made under section 6013(b) after the filing of a separate return.

[T.D. 6500, 25 FR 12108, Nov. 26, 1960, as amended by T.D. 7670, 45 FR 6929, Jan. 31, 1980; T.D. 8725, 62 FR 39117, July 22, 1997]

§ 1.6013-3 Treatment of joint return after death of either spouse.

For purposes of section 21 (relating to change in rates during a taxable year), section 443 (relating to returns for a period of less than 12 months), and section 7851(a)(1)(A) (relating to

the applicability of certain provisions of the Internal Revenue Code of 1954 and the Internal Revenue Code of 1939), where the husband and wife have different taxable years because of death of either spouse, the joint return shall be treated as if the taxable years of both ended on the date of the closing of the surviving spouse's taxable year. Thus, in cases where the Internal Revenue Code of 1939 otherwise would apply to the taxable year of the decedent spouse and the Internal Revenue Code of 1954 would apply to the taxable year of the surviving spouse, this provision makes the Internal Revenue Code of 1954 applicable to the taxable years of both spouses if a joint return is filed.

§ 1.6013-4 Applicable rules.

(a) *Status as husband and wife.* For the purpose of filing a joint return under section 6013, the status as husband and wife of two individuals having taxable years beginning on the same day shall be determined:

(1) If the taxable year of each individual is the same, as of the close of such year; and

(2) If the close of the taxable year is different by reason of the death of one spouse, as of the time of such death.

An individual legally separated from his spouse under a decree of divorce or of separate maintenance shall not be considered as married. However, the mere fact that spouses have not lived together during the course of the taxable year shall not prohibit them from making a joint return. A husband and wife who are separated under an interlocutory decree of divorce retain the relationship of husband and wife until the decree becomes final. The fact that the taxpayer and his spouse are divorced or legally separated at any time after the close of the taxable year shall not deprive them of their right to file a joint return for such taxable year under section 6013.

(b) *Computation of income, deductions, and tax.* If a joint return is made, the gross income and adjusted gross income of husband and wife on the joint return are computed in an aggregate amount and the deductions allowed and