

**State of Minnesota
Department of Revenue**

**In the Matter of the Proposed Adoption
Without a Public Hearing of Permanent
Rules Governing Returns Made
by the Commissioner**

**STATEMENT OF NEED
AND REASONABLENESS**

This document has been prepared to establish the statutory authority, need for, and reasonableness of the proposed part governing returns made by the commissioner. It is submitted pursuant to Minn. Stat. § 14.23 (1990) and Minn. Rules, part 2010.0700 (1991) requiring a Statement of Need and Reasonableness.

In preparing this Statement of Need and Reasonableness, the Department has considered this part's impact on local public bodies, agricultural land, and small businesses. The proposed part will not result in the expenditure of public money by local public bodies or have a direct and substantial adverse impact on agricultural land or small businesses.

Authority to Adopt Rules

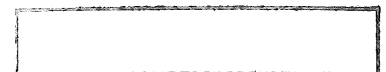
Minn. Stat. § 270.06(13) (1990) provides that the Commissioner of Revenue shall promulgate rules concerning the administration of state tax laws.

Minnesota Rules, part 8160.0620, Returns Made by the Commissioner

If a taxpayer fails to file a required return, the commissioner may make a return for the taxpayer under Minn. Stat. § 289A.35 (1990). That statutory authorization does not clarify the status of returns made by the commissioner for the purposes of other statutory requirements. Statutory requirements relating to assessment, orders of assessment, limitations on time for assessment, periods of limitation for collection, and administrative appeal vary depending upon whether returns made by the commissioner are considered more analogous to returns filed by taxpayers or to orders of assessment issued by the commissioner. Questions arise regarding the

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required treatment of returns made by the commissioner. The Department needs this part to set consistent policy for itself and the public to follow.

Subpart Analysis

Subpart 1. This subpart introduces the subject of the part and defines two terms which are repeatedly used in the part. The duplication of the statutory language in Minn. Stat. § 289A.35 (1990), allows the reader to clearly understand the subject of the part without referring to the statute.

Item A names a return made by the commissioner a "commissioner filed return". The term "commissioner filed return" is used throughout the Department as a shortened reference to a return made by the commissioner.

Item B defines the filing date of a commissioner filed return. The filing date is defined because the date is not given by statute but is necessary to establish a date of assessment. A commissioner filed return is an assessment in the form of a return made by the commissioner. The date of assessment of a return is the date the return was filed or should have been filed, whichever is later. Minn. Stat. § 270.65 (1990). Defining the filing date as the date the commissioner filed return is signed by the commissioner is reasonable because if a taxpayer files an untimely return, the taxpayer's return is considered filed on the date of receipt of the return by the commissioner. Minn. Stat. § 270.271 (1990). The date the return is signed by the commissioner is also the date the tax liability shown on the return is entered into the Department's records.

Subpart 2. This subpart clarifies that although a commissioner filed return is prima facie correct and valid, it should not be considered by the Department or by taxpayers as satisfying a taxpayer's obligation to file a return.

A commissioner filed return is used as a collection tool and as an inducement to the taxpayer to file. The Department's objectives are not limited to collection of the tax. The Department's objectives include collecting the correct amount of tax and

securing taxpayers compliance with filing requirements. This subpart provides incentive for taxpayers to file. This subpart allows the tax liability shown on a taxpayer's return to displace the liability shown on a commissioner filed return.

A taxpayer's return is the taxpayer's own assessment which contains a valid confession of judgment and a declaration that the return is correct. The taxpayer's return should reflect the taxpayer's correct tax liability. Also, criminal penalties exist for the taxpayer's failure to file which are unrelated to whether the correct tax is collected. *See e.g.*, Minn. Stat. § 289A.63, subd. 1 (1990). Federally, the IRS prepares returns for non-filers under 26 U.S.C. § 6020(b) (1986). The statute authorizing the IRS to make returns for non-filers is similar to Minnesota's statute authorizing commissioner filed returns. Federal courts have addressed the issue of whether a return executed by the secretary of the treasury constitutes a filed return, and they have found that it does not. The filing of a return for a taxpayer by the IRS does not excuse the taxpayer from filing a return. The filing of a secretary's return by the IRS is an administrative step which allows the assessment and collection process to begin. *See, Moore v. C.I.R.*, 722 F.2d 193, 196 (5th Cir. 1984); *United States v. Lacy*, 658 F.2d 396, 397 (5th Cir. 1981).

Because the Department considers receiving a return from each taxpayer a necessary part of the Department's authority to fix and collect tax liability under state tax law, a taxpayer is allowed the opportunity to displace the tax liability shown on a commissioner filed return with the taxpayer's own calculation of the tax liability. If the taxpayer files a return, the Department and the taxpayer, except with respect to the imposition of interest and penalties, are in the same position they would have been in had the taxpayer filed a return before a commissioner filed return was filed. A taxpayer who has failed to file a timely appeal to tax court does not have to pay the entire amount of tax shown on a commissioner filed return (an amount which could

be incorrect or overstated) and claim a refund, but may instead file a return for the correct amount of tax.

Taxpayers, however, are not allowed to take advantage of this provision if they are currently appealing a commissioner filed return or after the issue of liability on a commissioner filed return has been adjudicated. Exclusion of taxpayers who are appealing or have appealed a commissioner filed return is reasonable and necessary, because, at that point, a taxpayer's liability is being or has been determined by the Tax Court and not the Department of Revenue.

Subpart 3. As long as a taxpayer has not filed a return, correction of the tax shown on a commissioner filed return may be accomplished by making a subsequent commissioner filed return. Minn. Stat. § 289A.35 (1990); *See, Clemings v. Comm'r of Revenue*, Minn. Tax Ct., doc. no. 2426 (April, 6 1978). The Department may also choose to correct a commissioner filed return in a more formal manner by issuing an order of assessment under Minn. Stat. § 289A.37 (Supp. 1991).

If the taxpayer has filed a return, the Department's only available tool for adjusting the tax liability on the taxpayer's return is an order of assessment. A commissioner filed return may not be used after the taxpayer has filed a return. To adjust the taxpayer's return, the Department must issue an order of assessment under Minn. Stat. § 289A.37 (1990).

Subpart 4. The filing of the taxpayer's return starts the 3-1/2 year statute of limitations for assessment running under Minn. Stat. § 289A.38, subd. 1 (1990). The statute does not begin to run with the filing of a commissioner filed return because under Minn. Stat. § 289A.38, subd. 5, notwithstanding subdivision 1, if a taxpayer fails to file, tax may be assessed at any time.

Subpart 5. There is no authority in Minn. Stat. § 289A.65 (1990) for administratively appealing a commissioner filed return because it is not an order. Furthermore, allowing administrative appeal of a commissioner filed return adds an

unnecessary layer to the process of determining a taxpayer's correct tax liability because the taxpayer can change the liability merely by filing a return (see subpart 2). Once the taxpayer files a return, a subsequent order of assessment based upon audit of the return is appealable administratively.

Commissioner filed returns, however, are appealable to the tax court. The tax court has reviewed taxpayers' challenges to commissioner filed returns. *See, e.g., Petersen, Jr. v. Comm'r of Revenue*, Minn. Tax Ct., doc. no. 4192 (July 18, 1985); *Miller v. Comm'r of Revenue*, Minn. Tax Ct., doc. no. 2918 (December 23, 1980).

Subpart 6. As was stated in the analysis of subpart 2, the filing of a commissioner filed return does not satisfy a taxpayer's obligation to make and file a return. This obligation continues to exist and interest and penalties based on failure to file still apply.

Subpart 7. An assessment is required in order for there to be a collectible tax liability. The filing of a commissioner filed return is an assessment of tax under Minn. Stat. § 289A.35 (1990), but the definition of "date of assessment" in Minn. Stat. § 270.65 (1990) does not provide a date specifically for commissioner filed returns. Presumably, the language in Minn. Stat. § 270.65 (1990), stating that, "date of assessment means the date a return was filed or the date a return should have been filed whichever is later" is applicable to commissioner filed returns. It is reasonable to conclude that the date a commissioner filed return is filed is the date of assessment and starts the statutes of limitations running for collection.

An assessment subsequent to the filing of a commissioner filed return does not change the date of assessment for any amount shown on the commissioner filed return because the statutes of limitation for collection of the liability shown on the commissioner filed return begin to run on its date of the filing. Expressly stating that the assessment date remains the same preserves Department's priority as a creditor. While the language in this subpart merely restates current law, it is necessary to avoid

any implication that because the liability on the taxpayer's return replaces the liability on the commissioner filed return there is a new date of assessment. Any amount subsequently assessed by a taxpayer or the commissioner which is less than or equal to the amount shown on the previous assessment, has actually already been assessed. The date of assessment for taxes assessed in excess of the amount shown on a commissioner filed return is a new date because, to that extent, it is an entirely new assessment. The date of assessment for the excess is based on Minn. Stat. §§ 270.65 and 270.271, subd. 4 (1990).

Since a commissioner filed return is a collection tool, the periods of limitation should begin to run with the filing of a commissioner filed return. This encourages the Department to promptly follow the filing of a commissioner filed return with collection activities.

**State of Minnesota
Department of Revenue**

**In the Matter of the Proposed Adoption
Without a Public Hearing of Permanent
Rules Governing Orders of Assessment
Issued When No Return has been Filed**

**STATEMENT OF NEED
AND REASONABLENESS**

This document has been prepared to establish the statutory authority, need for, and reasonableness of the proposed part governing orders of assessment issued when no return has been filed. It is submitted pursuant to Minn. Stat. § 14.23 (1990) and Minn. Rules, part 2010.0700 (1991) requiring a Statement of Need and Reasonableness.

In preparing this Statement of Need and Reasonableness, the Department has considered this part's impact on local public bodies, agricultural land, and small businesses. The proposed part will not result in the expenditure of public money by local public bodies or have a direct and substantial adverse impact on agricultural land or small businesses.

Authority to Adopt Rules

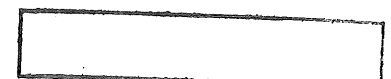
Minn. Stat. § 270.06(13) (1990) provides that the Commissioner of Revenue shall promulgate rules concerning the administration of state tax laws.

Minnesota Rules, part 8160.0630, Orders of Assessment Issued When No Return has been Filed

If a taxpayer has not filed a return, the commissioner may make a return for the taxpayer under Minn. Stat. § 289A.35 (1990) or send an order of assessment to the taxpayer under Minn. Stat. § 289A.37, subd. 1 (Supp. 1991). Questions regarding orders of assessment issued when no return has been filed arise because if a taxpayer files a return at all, it is filed after the taxpayer receives an order of assessment. What effect does the taxpayer's subsequent filing of a return have on an order of assessment? The

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Department needs this part to clarify the consequences of issuing an order of assessment when the taxpayer has not filed a return.

Subpart Analysis.

Subpart 1. This subpart repeats statutory language found in Minn. Stat. § 289A.37, subd. 1 (Supp. 1991). The repetition is necessary for the reader to clearly understand the subject part. The subject of the part is orders of assessment issued when no return has been filed, not orders of assessment generally.

Subpart 2. The purpose of this subpart is to clarify that a taxpayer has to file a return regardless of whether an order of assessment has been issued. Collecting tax is the motivation behind issuing the order, but obtaining information from the taxpayer in the form of a return is still a requirement. This is demonstrated by state statutes authorizing criminal and civil penalties for failure to file. *See, e.g.*, Minn. Stat. §§ 289A.60 and 289A.63 (1990).

The taxpayer's return does not, however, establish the tax liability because all orders of assessment should be treated consistently. If an order of assessment and a taxpayer's return disagree, the return can be the basis of the taxpayer's administrative appeal and the issue of determining the correct liability is moved to the administrative review level. Non-filers are not given special treatment. A taxpayer who files a return and is subsequently assessed tax based upon audit of that return has to appeal administratively or to tax court if the taxpayer disagrees with the assessment. Under this subpart, non-filers will also follow this procedure.

Subpart 3. This subpart clarifies that even though an order of assessment establishes the taxpayer's tax liability, it does not start the period of limitations for assessment. If the taxpayer fails to file a return, tax may be assessed at any time. Minn. Stat. § 289A.38, subd. 5 (1990). This provision is consistent with the proposed part governing commissioner filed returns.

Subpart 4. Orders assessing tax are administratively appealable under Minn. Stat. § 289A.65 (1990). This subpart requires the taxpayer's return accompany the taxpayer's written administrative appeal except when the requirement to file is in dispute. Requiring the taxpayer to file a return is reasonable because, unless the requirement to file is in dispute, the review will be related to information which should be contained in a return.

Subpart 5. This subpart clarifies the treatment of penalties for failure to file a return and failure to pay tax. As stated in the analysis of subpart 2, even though an order of assessment establishes a taxpayer's tax liability, the taxpayer is still obligated to file a return. Penalties for failure to file continue until the taxpayer files. Penalties for failure to pay tax are discussed in this subpart because under Minn. Stat. § 289A.37, subd. 1(b) (1990), the taxpayer has 60 days after notice of the order of assessment or 60 days after final determination of an appeal to pay the tax shown on the assessment without penalty. Penalties for failure to pay should, however, accrue before and after the appeal period because payment is first due at the time the return was required to be filed and continues to be due after expiration of the order's appeal and payment period. Stating that interest continues to accrue under Minn. Stat. § 289A.55, subd. 2 (1990) is necessary to avoid any inference that because it was left out of the subpart, it is not due.

Subpart 6. The date of the order assessing taxes is the "date of assessment" under Minn. Stat. § 270.65 (1990). Periods of limitation on collection begin on the date of assessment. The date the order of assessment is made starts the statutes of limitations on collection running.

Because the collection period is running, the subsequent filing of a return by the taxpayer does not change the assessment date for any amount for which the statute of limitation on collections began to run on the date of the order. The date of assessment for taxes reported by a taxpayer on a return which exceeds the amount on

an order of assessment is based on Minn. Stat. §§ 270.65 and 270.271, subd. 4 (1990). This provision is consistent with the proposed part governing commissioner filed returns.