(2) An adjustment under the circumstances stated in § 1.1312–2, paragraph (a) of § 1.1312–3, § 1.1312–5, § 1.1312–6, or § 1.1312–7 which would result in an additional assessment is not authorized if the Commissioner, and not the taxpayer, has maintained such inconsistent position.

Example: In the example in subparagraph (1) of this paragraph, assume that the taxpayer did not file a claim for refund for 1951 but the Commissioner issued a notice of deficiency for 1951 based upon other items. The taxpayer filed a petition with the Tax Court of the United States and the Commissioner in his answer voluntarily proposed the allowance for 1951 of a deduction for the loss previously allowed for 1950. The Tax Court took the deduction into account in its redetermination in 1955 of the tax for the year 1951. In such case no adjustment would be authorized for the year 1950 as the Commissioner, and not the taxpayer, has maintained a position inconsistent with the allowance of a deduction for the loss in that year.

[T.D. 6500, 25 FR 12032, Nov. 26, 1960, as amended by T.D. 6617, 27 FR 10823, Nov. 7, 1962]

§ 1.1311(b)–2 Correction not barred at time of erroneous action.

(a) An adjustment under the circumstances stated in paragraph (b) of § 1.1312–3 (relating to the double exclusion of an item of gross income) which would result in an additional assessment, is authorized only if assessment of a deficiency against the taxpayer or related taxpayer for the taxable year in which the item is includible was not barred by any law or rule of law at the time the Commissioner first maintained, in a notice of deficiency sent pursuant to section 6212 (or section 272(a) of the Internal Revenue Code of 1939) or before the Tax Court of the United States, that the item described in paragraph (b) of § 1.1312–3 should be included in the gross income of the taxpayer in the taxable year to which the determination relates.

(b) An adjustment under the circumstances stated in § 1.1312–4 (relating to the double disallowance of a deduction or credit), which would result in the allowance of a credit or refund, is authorized only if a credit or refund to the taxpayer or related taxpayer, attributable to such adjustment, was not barred by any law or rule of law when the taxpayer first maintained in writing before the Commissioner or the Tax Court that he was entitled to such deduction or credit for the taxable year to which the determination relates. The taxpayer will be considered to have first maintained in writing before the Commissioner or the Tax Court that he was entitled to such deduction or credit when he first formally asserts his right to such deduction or credit as, for example, in a return, in a claim for refund, or in a petition (or an amended petition) before the Tax Court.

(c) Under the circumstances of adjustment with respect to which the conditions stated in this section are applicable, the conditions stated in § 1.1311(b)–1 (maintenance of an inconsistent position) are not required. See paragraph (b) of § 1.1312–3 and § 1.1312–4 for examples of the application of this section.

[T.D. 6500, 25 FR 12032, Nov. 26, 1960]

§ 1.1311(b)–3 Existence of relationship in case of adjustment by way of deficiency assessment.

(a) Except for cases described in paragraph (b) of § 1.1312–3, no adjustment by way of a deficiency assessment shall be made, with respect to a related taxpayer, unless the relationship existed both at some time during the taxable year with respect to which the error was made and at the time the taxpayer with respect to whom the determination is made first maintained the inconsistent position with respect to the taxable year to which the determination relates. In the case of an adjustment by way of a deficiency assessment under the circumstance described in paragraph (b) of § 1.1312–3 (where the maintenance of an inconsistent position is not required), the relationship need exist only at some time during the taxable year in which the error was made.

(b) If the inconsistent position is maintained in a return, claim for refund, or petition (or amended petition) to the Tax Court of the United States for the taxable year in respect to which the determination is made, the requisite relationship must exist on the date of filing such document. If the inconsistent position is maintained in

more than one of such documents, the requisite date is the date of filing of the document in which it was first maintained. If the inconsistent position was not thus maintained, then the relationship must exist on the date of the determination as, for example, where at the instance of the taxpayer a deduction is allowed, the right to which was not asserted in a return, claim for refund, or petition to the Tax Court, and a determination is effected by means of a closing agreement or an agreement under section 1313(a)(4).

[T.D. 6500, 25 FR 12033, Nov. 26, 1960]

§ 1.1312–1 Double inclusion of an item of gross income.

(a) Paragraph (1) of section 1312 applies if the determination requires the inclusion in a taxpayer's gross income of an item which was erroneously included in the gross income of the same taxpayer for another taxable year or of a related taxpayer for the same or another taxable year.

(b) The application of paragraph (a) of this section may be illustrated by the following examples:

Example 1. A taxpayer who keeps his books on the cash method erroneously included in income on his return for 1947 an item of accrued rent. In 1952, after the period of limitation on refunds for 1947 had expired, the Commissioner discovered that the taxpayer received this rent in 1948 and asserted a deficiency for the year 1948 which is sustained by the Tax Court of the United States in 1955. An adjustment in favor of the taxpayer is authorized with respect to the year 1947. If the taxpayer had returned the rent for both 1947 and 1948 and by a determination was denied a refund claim for 1948 on account of the rent item, a similar adjustment is authorized.

Example 2. A husband assigned to his wife salary to be earned by him in the year 1952. The wife included such salary in her separate return for that year and the husband omitted it. The Commissioner asserted a deficiency against the wife for 1952 with respect to a different item; she contested that deficiency, and the Tax Court entered an order in her case which became final in 1955. The wife would therefore be barred by section 6512(a) from claiming a refund for 1952. Thereafter, the Commissioner asserted a deficiency against the husband on account of the omission of such salary from his return for 1952. In 1955 the husband and the Commissioner enter into a closing agreement for the year 1952 in which the salary is taxed to the husband. An adjustment is authorized with respect to the wife's tax for 1952.

[T.D. 6500, 25 FR 12033, Nov. 26, 1960]

§ 1.1312–2 Double allowance of a deduction or credit.

(a) Paragraph (2) of section 1312 applies if the determination allows the taxpayer a deduction or credit which was erroneously allowed the same taxpayer for another taxable year or a related taxpayer for the same or another taxable year.

(b) The application of paragraph (a) of this section may be illustrated by the following examples:

Example 1. A taxpayer in his return for 1950 claimed and was allowed a deduction for destruction of timber by a forest fire. Subsequently, it was discovered that the forest fire occurred in 1951 rather than 1950. After the expiration of the period of limitations for the assessment of a deficiency for 1950, the taxpayer filed a claim for refund for 1951 based upon a deduction for the fire loss in that year. The Commissioner in 1955 allows the claim for refund. An adjustment is authorized with respect to the year 1950.

Example 2. The beneficiary of a testamentary trust in his return for 1949 claimed, and was allowed, a deduction for depreciation of the trust property. The Commissioner asserted a deficiency against the beneficiary for 1949 with respect to a different item and a final decision of the Tax Court of the United States was rendered in 1951, so that the Commissioner was thereafter barred by section 272(f) of the Internal Revenue Code of 1939 from asserting a further deficiency against the beneficiary for 1949. The trustee thereafter filed a timely refund claim contending that, under the terms of the will, the trust, and not the beneficiary, was entitled to the allowance for depreciation. The court in 1955 sustains the refund claim. An adjustment is authorized with respect to the beneficiary's tax for 1949.

[T.D. 6500, 25 FR 12033, Nov. 26, 1960]

§ 1.1312–3 Double exclusion of an item of gross income.

(a) *Items included in income or with respect to which a tax was paid.* (1) Paragraph (3)(A) of section 1312 applies if the determination requires the exclusion, from a taxpayer's gross income, of an item included in a return filed by the taxpayer, or with respect to which tax was paid, and which was erroneously excluded or omitted from the gross income of the same taxpayer for another taxable year or of a related