



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
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SMALL BUSINESS/SELF-EMPLOYED

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MEMORANDUM FOR: COMMISSIONER, LARGE BUSINESS AND INTERNATIONAL; COMMISSIONER, SMALL BUSINESS/SELF-EMPLOYED; COMMISSIONER, WAGE & INVESTMENT; and CHIEF APPEALS

FROM: Mark E. Pursley /s/ *Mark E. Pursley*
Director, Servicewide Operations

SUBJECT: Interim Guidance on the method to compute Intentional Disregard Penalty under IRC § 6721(e)(2) related to filing on Incorrect Media

The purpose of this memorandum is to issue interim guidance regarding the method of computing the “aggregate amount of the items required to be reported correctly” for purposes of the intentional disregard penalty under IRC § 6721(e)(2) when a taxpayer fails to report on magnetic media as required under IRC § 6011(e).

BACKGROUND

Section 6011(e)(1) provides that the Secretary shall prescribe regulations for determining which returns must be filed on magnetic media or in other machine-readable form. Treasury Regulation § 301.6011-2(b)-(c) generally provides that a person who is required to file 250 or more information returns per calendar year must file on magnetic media. The 250 return threshold applies separately to each type of form required to be filed per Treas. Reg. 301.6011-2(c)(1)(iii). The types of information returns subject to this requirement are found in Treas. Reg. 301.6011-2(b). Section 6721(a) imposes a penalty for failure to file correct information returns. A failure for purposes of the section 6721 penalty includes a failure to comply with the section 6011(e) requirement to file returns on magnetic media per IRC § 6724(c) and Treas. Reg. 301.6721-1(a)(2)(ii). Section 6721(e)(2) provides for an increased penalty amount when the failure is due to intentional disregard.

The amount of the penalty under section 6721(e)(2) depends on the type of return being filed.

The penalty imposed under IRC § 6721(e)(2)(A) is \$500, or, if greater, in the case of a return other than a return required under §§ 6045(a), 6041A(b), 6050H, 6050I, 6050J, 6050K, or 6050L, 10% of the *aggregate amount of the items required to be reported correctly*.¹

The penalty imposed under IRC § 6721(e)(2)(B) is \$500, or, if greater, in the case of a return required to be filed by section 6045(a), 6050K, or 6050L, 5% of the *aggregate amount of the items required to be reported correctly*.

This interim guidance provides guidance on how to compute the “aggregate amount of the items required to be reported correctly” for the purpose of the intentional disregard penalty for filing on incorrect media.

PROCEDURAL GUIDANCE

In applying the intentional disregard penalty under IRC § 6721(e)(2) related to filing on incorrect media, the method to compute the “aggregate amount of the items required to be reported correctly” under either IRC § 6721(e)(2)(A) or IRC § 6721(e)(2)(B) is as follows:

- Step (1): Take the average of the amounts reported on all the returns or statements that were incorrectly paper-filed for the calendar year.
- Step (2): Multiply the average from step (1) by the number of returns that are subject to penalty (i.e., the number of paper-filed returns above 250).
- Step (3): Multiply step (2) by the applicable percentages in either IRC § 6721(e)(2)(A) or IRC § 6721(e)(2)(B).
- Step (4): Multiply the number of returns subject to penalty by \$500 (for returns and statements required to be filed after December 31, 2015, subject to annual inflationary adjustments).
- Step (5): Compare the result in step (3) and (4), and assess the greater amount.

Example: Assume a taxpayer intentionally paper-filed 300 Forms 1042-S for tax year 2016. Further assume that the “aggregate amount of the items required to be reported correctly” was \$6,000,000 for Box 2 (Gross Income) on Form 1042-S:

- Step (1): Amounts reflected on the 300 returns totals \$6,000,000. The average amounts equal \$20,000 ($\$6,000,000 / 300$ returns).
- Step (2): \$20,000 (Amount from step 1) x 50 (number of returns greater than 250) = \$1,000,000.
- Step (3): \$1,000,000 (Amount from step 2) x 10% (rate provided in IRC § 6721(e)(2)(A)) = \$100,000.
- Step (4): 50 returns (Number of returns subject to penalty) x \$530 (Penalty

¹ Besides the returns addressed in section 6721(e)(2)(B), section 6721(e)(2)(C) and (D) address calculation of the penalty in cases of intentional disregard with respect to returns required to be filed under section 6050I(a) and 6050V, respectively.

rate for 2016 including inflationary adjustment) = \$26,500.

- Step (5): Compare \$100,000 (Amount from step 3) with \$26,500 (Amount from step 4). The penalty under IRC § 6721(e)(2)(A) is \$100,000.

EFFECT ON OTHER DOCUMENTS

IRM 20.1.7 will be amended to take into account the information above.

EFFECTIVE DATE

This interim guidance is effective August 16, 2016.

DISTRIBUTION

If you have questions, please contact Robert Malone, Program Manager, Office of Servicewide Penalties.

cc: www.irs.gov