

Part III – Administrative, Procedural, and Miscellaneous

SUPPLEMENTAL GUIDANCE UNDER THE PREPARER PENALTY PROVISIONS OF THE SMALL BUSINESS AND WORK OPPORTUNITY TAX ACT OF 2007

NOTICE 2008-46

This notice provides guidance regarding implementation of the tax return preparer penalty provisions under section 6694 of the Internal Revenue Code, as amended by the Small Business and Work Opportunity Tax Act of 2007, Pub. L. No. 110-28, 121 Stat. 190, by adding certain returns and documents supplementing Exhibits 1, 2, and 3 of Notice 2008-13, 2008-3 I.R.B. 282.

A. Returns and Claims for Refund Subject to 6694 Penalty

Notice 2008-13 describes categories of returns and other documents to which section 6694 could apply. Notice 2008-13 provides that, solely for purposes of section 6694, a return or claim for refund includes the tax returns listed in Exhibit 1 or a claim for refund with respect to any such return. The Notice further provides that a person who for compensation prepares all or a substantial portion of any of the tax returns listed on Exhibit 1 is a tax return preparer who is subject to section 6694.

Notice 2008-13 also provides that solely for purposes of section 6694, an information return or document listed on Exhibit 2 that includes information that is or may be reported on a taxpayer's tax return or claim for refund is a return to which

section 6694 could apply if the information reported constitutes a *substantial portion* of that taxpayer's tax return or claim for refund. A person who for compensation prepares any of the information returns or documents listed on Exhibit 2, which return or document does not report a tax liability but affects an entry or entries on a tax return and constitutes a substantial portion of the tax return or claim for refund that does report a tax liability, is a tax return preparer who is subject to section 6694.

Notice 2008-13 also provides that solely for purposes of section 6694, a document listed on Exhibit 3 that includes information that is or may be reported on a taxpayer's tax return or claim for refund (and that constitutes a substantial portion of such tax return or claim for refund) will not subject the preparer to a penalty under section 6694(a). A document listed on Exhibit 3, however, may subject the preparer to a willful or reckless conduct penalty under section 6694(b) if the information reported on the document constitutes a substantial portion of the tax return or claim for refund and is prepared willfully in any manner to understate the liability of tax on a tax return or claim for refund, or in reckless or intentional disregard of rules or regulations. A person who for compensation prepares all or a substantial portion of any of the documents listed on Exhibit 3 is not a tax return preparer subject to section 6694(a) unless the document was prepared willfully in any manner to understate the liability of tax on a tax return or claim for refund or in reckless or intentional disregard of rules or regulations.

Notice 2008-13 also provides that the Treasury Department and the Internal Revenue Service may add or remove forms or documents from any of the categories or exhibits to Notice 2008-13 in future guidance. Accordingly, the following returns and documents are added to Exhibits 1, 2, and 3 of Notice 2008-13:

Exhibit 1 – Tax Returns Reporting Tax Liability

- (1) Form 1040-C, U.S. Departing Alien Income Tax Return;
- (2) Form 1040NR, U.S. Nonresident Alien Income Tax Return;
- (3) Form 1040NR-EZ, U.S. Income Tax Return for Certain Nonresident Aliens With No Dependents;
- (4) Form 1041-N, U.S. Income Tax Return for Electing Alaska Native Settlement Trusts;
- (5) Form 1041-QFT, U.S. Income Tax Return for Qualified Funeral Trusts;
- (6) Form 1120-FSC, U.S. Income Tax Return of a Foreign Sales Corporation;
- (7) Form 1120-H, U.S. Income Tax Return for Homeowners Associations;
- (8) Form 1120-L, U.S. Life Insurance Company Income Tax Return;
- (9) Form 1120-ND, Return for Nuclear Decommissioning Funds and Certain Related Persons;
- (10) Form 1120-PC, U.S. Property and Casualty Insurance Company Income Tax Return;
- (11) Form 1120-POL, U.S. Income Tax Return for Certain Political Organizations;
- (12) Form 1120-REIT, U.S. Income Tax Return for Real Estate Investment Trusts;
- (13) Form 1120-RIC, U.S. Income Tax Return for Regulated Investment Companies;
- (14) Form 1120-SF, U.S. Income Tax Return for Settlement Funds (Under Section 468B);
- (15) Form 1040-SS, U.S. Self-Employment Tax Return;
- (16) Form 2438, Undistributed Capital Gains Tax Return;
- (17) Form 8288, U.S. Withholding Tax Return for Disposition by Foreign Persons of U.S. Real Property Interests;
- (18) Form 8752, Required Payment or Refund under Section 7519; and
- (19) Form 8804, Annual Return for Partnership Withholding Tax (Section 1446).

Exhibit 2 – Information Returns That Report Information That is or May be Reported on Another Tax Return That May Subject a Tax Return Preparer to the Section 6694(a) Penalty if the Information Reported Constitutes a Substantial Portion of the Other Tax Return

- (1) Form 3520, Annual Return to Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts;
- (2) Form 3520-A, Annual Return of Foreign Trust With a U.S. Owner;
- (3) Form 5471, Report by Shareholders of a Foreign Corporation;
- (4) Form 5472, Information Return of a 25% Foreign Owned U.S. Corporation or a Foreign Corporation Engaged in a U.S. Trade or Business;
- (5) Form 8805, Foreign Partner's Information Statement of § 1446 Withholding Tax;
- (6) Form 8858, Information Return of US Person with Respect to Disregarded Entities;
- and
- (7) Form 8865 – Return of U.S. Persons with Respect to Certain Foreign Partnerships.

Exhibit 3 - Forms That Would Not Subject a Tax Return Preparer to the Section 6694(a) Penalty Unless Prepared Willfully in any Manner to Understate the Liability of Tax on a Return or Claim for Refund or in Reckless or Intentional Disregard of Rules or Regulations

(1) Form 8288-A, Statement of Withholding on Dispositions by Foreign Persons of U.S. Real Property Interests; and

(2) Form 8288-B, Application for Withholding Certificate for Dispositions by Foreign Persons of U.S. Real Property Interests.

EFFECTIVE DATE

This notice is effective as of April 16, 2008.

EFFECT ON OTHER DOCUMENTS

Notice 2008-13, 2008-3 I.R.B. 282, is supplemented.

CONTACT INFORMATION

The principal authors of this notice are Matthew S. Cooper and Michael E. Hara of the Office of Associate Chief Counsel (Procedure and Administration). For further information regarding this notice, contact Mr. Cooper at (202) 622-4940 or Mr. Hara at (202) 622-4910 (not toll-free calls).