

Medical Device Excise Tax Deposit Penalty Relief

Notice 2018-10

SECTION 1. PURPOSE

This notice provides guidance relating to the excise tax on medical devices imposed by § 4191 (the “medical device excise tax”) of the Internal Revenue Code (the “Code”). Specifically, this notice provides temporary relief to medical device manufacturers from the failure to deposit penalties imposed by § 6656.

SECTION 2. BACKGROUND

Section 4191 imposes a 2.3% excise tax on the sale of certain medical devices by the manufacturer.

Section 174 of the Protecting Americans from Tax Hikes Act of 2015, enacted as part of the Consolidated Appropriations Act, 2016, Division Q, Pub. L. 114-113, 129 Stat. 2242, 3071 (December 18, 2015) (jointly, the Act), established a two-year moratorium on the medical device excise tax for the period that began on January 1, 2016, and ended on December 31, 2017. Thus, sales of taxable medical devices during the moratorium period were not subject to tax. Absent further legislative action, the medical device excise tax applies to sales of taxable medical devices on and after January 1, 2018.

The medical device excise tax is codified in subtitle D, chapter 32 of the Code (“chapter 32”), which pertains to excise taxes imposed on the sale or use of taxable articles by manufacturers, producers, and importers. Chapter 32 taxes, including the

medical device excise tax, are reported on Form 720, *Quarterly Federal Excise Tax Return*. See §§ 40.6011(a)-1(a)(1) and 40.0-1(a).

Section 6302 of the Code authorizes the IRS to establish the mode and time for collecting certain taxes, including the taxes imposed by chapter 32. Section 40.6302(c)-1(a)(1) of the Excise Tax Procedural Regulations requires each person that is required to file Form 720 to make deposits of tax for each semimonthly period in which the tax liability is incurred. A semimonthly period is the first 15 days of a calendar month or the portion of a calendar month following the 15th day of the month. See § 40.0-1(c).

The deposit for a tax imposed by chapter 32 for each semimonthly period must not be less than 95% of the amount of net tax liability incurred during the semimonthly period unless the safe harbor in § 40.6302(c)-1(b)(2)(ii) or (iii) applies. See § 40.6302(c)-1(b)(1). Under the safe harbor, any person that filed a Form 720 reporting a tax imposed by chapter 32 for the second preceding calendar quarter (the look-back quarter) is considered to have met the semimonthly deposit requirement for the current quarter if: (i) the deposit for each semimonthly period in the current calendar quarter is not less than 1/6 of the net tax liability reported for the look-back quarter; (ii) each deposit is made on time; (iii) the amount of any underpayment is paid by the due date of the return; and (iv) the person's liability does not include any tax that was not imposed during the look-back quarter. Section 40.6302(c)-1(b)(2)(v) provides that if a person fails to make deposits as required, the IRS may withdraw the person's right to use the safe harbor rules of § 40.6302(c)-1(b)(2).

Section 6656 imposes a penalty in the case of any failure by any person to make timely deposits as required by § 6302. A taxpayer may avoid penalties under § 6656 for

failure to make deposits of taxes if the taxpayer makes an affirmative showing that such failure is due to reasonable cause and not due to willful neglect. See § 6656 and the corresponding regulations.

SECTION 3. DEPOSIT PENALTY RELIEF

(a) Overview. With the end of the moratorium on the medical device excise tax, taxpayers are required to resume making semimonthly deposits of tax. The first deposit, covering the first 15 days of January, is due by January 29, 2018. In consideration of the short time frame between the end of the moratorium period and the due date of the first deposit and in the interest of sound tax administration, the IRS and the Treasury Department have decided to provide temporary relief from the § 6656 penalty for the first three calendar quarters of 2018, as described below. The normal rules under § 6656 and the corresponding regulations will apply with respect to deposits due during the fourth calendar quarter of 2018 and thereafter.

Beginning in the third calendar quarter of 2018, medical device manufacturers may use the safe harbor rules of § 40.6302(c)-1(b)(2) for semimonthly deposits due during that quarter. For purposes of the safe harbor, the first calendar quarter of 2018 is the look-back quarter for deposits due during the third calendar quarter.

(b) Relief. (i) During the first three calendar quarters of 2018, the IRS will not impose the penalty provided in § 6656 on a taxpayer liable for the medical device excise tax that fails to make timely deposits of the medical device excise tax as required by §§ 40.6302(c)-1 and 40.6302(c)-2 (relating to special deposits required in September), provided that the taxpayer demonstrates a good faith attempt to comply with requirements of §§ 40.6302(c)-1 and 40.6302(c)-2 and that the failure was not due to

willful neglect. Thereafter, a taxpayer may avoid penalties if it makes an affirmative showing that the failure to deposit is due to reasonable cause and not due to willful neglect.

(ii) During the third and fourth calendar quarters of 2018, the IRS will not exercise its authority under § 40.6302(c)-1(b)(2)(v) to withdraw the taxpayer's right to use the deposit safe harbor rules of § 40.6302(c)-1(b)(2) due to a failure to make deposits as required, provided the taxpayer satisfies the requirements of the first sentence of paragraph (b)(i) of this section for the look-back quarter at issue.

SECTION 4. EFFECTIVE DATE

This notice is effective on and after January 1, 2018.

SECTION 5. DRAFTING INFORMATION

The principal author of this notice is Natalie Payne of the Office of Associate Chief Counsel (Passthroughs & Special Industries). For further information regarding this notice, please contact Ms. Payne at (202) 317-6855 (not a toll-free call).