

**Office of Chief Counsel
Internal Revenue Service
memorandum**

Number: **20221101F**

Release Date: 3/18/2022

CC:TEGEDC:MAWAS:B:RWDENICK:
POSTU-120401-21

UILC: 6033.00-00, 6033.01-00

date: February 23, 2022

to: Steven A. Chamberlin
Area Manager, Exempt Organizations Examinations
(Tax Exempt & Government Entities)

from: Casey A. Lothamer
Area Counsel (Mid-Atlantic Area)
(Tax Exempt & Government Entities)

subject: Form 990-N Compliance Project

This responds to your inquiry concerning a compliance strategy (ICN 21004) (Compliance Strategy) involving tax-exempt organizations that submitted a Form 990-N and which, based on data derived from other federal tax forms (Forms W-2, 1099, etc.), appear to be ineligible to submit Form 990-N because they normally have gross receipts that exceed \$50,000. You have raised the following questions:

1. Whether the automatic revocation provision in section 6033(j)(1)(B) applies to tax-exempt organizations that failed to file the annual return required under section 6033(a)(1), where such organizations were determined as part of the Compliance Strategy to have improperly submitted three or more consecutive Forms 990-N, and were not provided the notification described in section 6033(j)(1)(A).¹
2. Whether the tax-exempt organizations that are placed in status 97 and subsequently automatically revoked under section 6033(j)(1)(B) must be afforded an opportunity for consideration by the Independent Office of Appeals (Appeals) because cases were assigned as examinations.

Background

¹ Except as otherwise indicated, all "section" references are to the Internal Revenue Code of 1986, as amended.

The Tax Exempt & Government Entities Division (TE/GE) has implemented a Compliance Strategy to determine an organization's appropriate Form 990 series filing status and, in certain cases, whether the organization is operating as an organization described in section 501(c)(3). The Compliance Strategy involves only organizations that submitted a Form 990-N. TE/GE is reviewing financial information from other federal tax forms, such as Forms W-2, 1099-MISC, 1099-K, 941, 990-T, 8283, W-2G, 1099-DIV, 1099-T, and 1040 Schedule C, to determine if an organization may not have been eligible to submit the Form 990-N. After reviewing the data, Compliance, Planning and Classification will select cases for examination based on potential indications that an organization was not eligible to submit a Form 990-N. Upon assignment by managers in Exempt Organizations Examination, an examination will be opened to confirm whether the organization normally had gross receipts not more than \$50,000 and was eligible to submit a Form 990-N.

If the Service determines that the organization was not eligible to submit a Form 990-N and the organization has not filed the required return (Form 990, Form 990-EZ, or Form 990-PF) for three consecutive years, the organization's exemption will be automatically revoked pursuant to section 6033(j)(1)(B). If the organization has not filed the required return for two or fewer years, the examiner will prepare substitutes for returns (or secure delinquent returns) as appropriate or, alternatively, if the organization is not organized or operated for section 501(c)(3) purposes, then the examiner will follow normal revocation procedures. In either instance, because the Service will have been unaware that the organization had not filed the required returns prior to the examination resulting from the Compliance Strategy, it will not have previously notified the organization as required under section 6033(j)(1)(A) that there is no record of the organization having filed the required return or notice for two consecutive years.

Law

Under section 6033(a)(1), every organization exempt from taxation under section 501(a), subject to certain exceptions, must file an annual information return (Form 990, Form 990-EZ, or Form 990-PF). Section 6033(a)(3)(A)(ii) provides a mandatory exception for organizations with annual gross receipts normally not more than \$5,000. Section 6033(a)(3)(B) additionally provides that the Secretary may relieve any organization (other than an organization described in section 509(a)(3)) from the annual return filing requirement where the Secretary determines such a filing is not necessary to the efficient administration of the internal revenue laws. Under this discretionary exception, most exempt organizations with annual gross receipts normally not more than \$50,000 are not required to file an annual information return. See Treas. Reg. § 1.6033-2(g)(1)(iii) and (viii). The gross receipts of an organization are normally not more than \$50,000 if, in the case of an organization that has been in existence for three years or more, the average of the gross receipts received by the organization in the immediately preceding three taxable years, including the year for which the return would be required to be filed, is \$50,000 or less. Treas. Reg. § 1.6033-2(g)(3)(iii); Rev. Proc. 2011-15, 2011-3 IRB 322.

Sections 6033(i) and (j) were added to the Internal Revenue Code by section 1223 of the Pension Protection Act (PPA) and became effective for taxable years beginning after 2006. Section 6033(i)(1) contains an annual electronic notice requirement for most exempt organizations that are not required to file an annual information return under section 6033(a)(1) because their annual gross receipts result in such organizations being referred to in section 6033(a)(3)(A)(ii) or (a)(3)(B). In effect, section 6033(i) generally requires an exempt organization to submit an annual electronic notice (Form 990-N, sometimes referred to as the e-Postcard) if its annual gross receipts are normally not more than \$50,000. The Department of the Treasury and the Service issued final regulations under section 6033(i) that describe the time and manner of submitting the annual electronic notice. See Treas. Reg. § 1.6033-6.

Section 6033(i)(1) and Treas. Reg. § 1.6033-6(c)(1) provide that the annual electronic notice shall set forth the legal name of the organization; any name under which the organization operates or does business; the organization's mailing address and Internet web site address; the organization's taxpayer identification number; the name and address of a principal officer; and evidence of the continuing basis for the organization's exemption from the return filing requirement under section 6033(a)(1).

Treas. Reg. § 1.6033-6(b)(1) provides that an organization that is required to file an annual information return under section 6033(a)(1) shall not submit an annual electronic notice. Treas. Reg. § 1.6033-6(c)(3) further provides that by submitting the annual electronic notice, "an organization acknowledges that it is not required to file a return under section 6033(a) because its annual gross receipts are not normally in excess of [\$50,000]." In order to make this determination, the organization must maintain records that enable it to calculate its gross receipts. All organizations are required to keep records under section 6001. These records will provide evidence of the continuing basis for the organization's exemption from the annual return requirement under section 6033(a)(1). Finally, the regulations provide that an organization's eligibility to submit the annual electronic notice under section 6033(i) rather than having to file a return does not relieve the organization from having to file other required information or tax returns, or from the penalties for the failure to file such returns.

Section 6033(j)(1)(B) provides that if an organization required to file an annual information return under section 6033(a)(1) or an annual electronic notice under section 6033(i) fails to file the return or notice required under either subsection for three consecutive years, the organization's tax-exempt status is revoked (automatic revocation). The revocation is effective as of the date set by the Secretary for the filing of the third required information return or electronic notice.

The Taxpayer First Act, Pub. L. 116-25 (July 1, 2019) amended section 6033 as follows (referenced in this memorandum as the notification requirement):

IRC 6033(j) Loss of exempt status for failure to file return or notice.--
(1) In general.--

(A) Notice.—If an organization described in subsection (a)(1) or (i) fails to file the annual return or notice required under either subsection for 2 consecutive years, the Secretary shall notify the organization--

- (i) that the Internal Revenue Service has no record of such a return or notice from such organization for 2 consecutive years, and
- (ii) about the revocation that will occur under subparagraph (B) if the organization fails to file such a return or notice by the due date for the next such return or notice required to be filed.

The language enacted in the Taxpayer First Act is identical to that as proposed when introduced in S. 978 and H.R. 1957. The legislative history evidencing intent as to the section 6033 amendment, set forth only in H.R. Rept. No. 116-39 (p. 101), does not exactly mirror the statutory language, but states as follows:

Present law does not require the IRS to notify an organization that already has failed to file a Form 990-series return or notice for two consecutive years that it is at risk of revocation if it fails to file for a third consecutive year. Many of the affected organizations are small and poorly funded yet face increasing demand for their services from the communities they serve. As a result, revocation can pose a significant financial burden on these organizations and their communities. The Committee therefore believes it is appropriate to require the IRS to notify organizations that are at risk of losing tax-exempt status for failure to file Form 990-series returns or notices and to provide information to help the organization prevent the loss of its tax-exempt status.

EXPLANATION OF PROVISION

The provision requires that the IRS provide notice to an organization that fails to file a Form 990-series return or notice for two consecutive years. The notice must state that the IRS has no record of having received such a return or notice from the organization for two consecutive years and inform the organization about the revocation of the organization's tax-exempt status that will occur if the organization fails to file such a return or notice by the due date for the next such return or notice. The notice must also contain information about how to comply with the annual information return and notice requirements under sections 6033(a)(1) and 6033(i).

Section 7123(c) provides that the Secretary shall prescribe procedures under which an organization which claims to be described in section 501(c) may request an administrative appeal to the Independent Office of Appeals of certain adverse determinations, including an adverse determination with respect to the continuing qualification of an organization as exempt from tax under section 501(a).

Section 7428(a)(1) provides for declaratory judgment action when an organization's exempt status is revoked. Section 7428 is not applicable when revocation occurs pursuant to section 6033(j). See section 7428(b)(4).

Rev. Proc. 2022-5, Sec. 12.02 provides that organizations revoked under section 6033(j) will not have an opportunity for consideration by the Independent Office of Appeals.

Analysis

i. Notification and Automatic Revocation

If an organization is required to file an annual information return on Form 990 or Form 990-EZ pursuant to section 6033(a)(1) or an annual electronic notice on Form 990-N pursuant to section 6033(i), section 6033(j)(1)(B) provides for the automatic revocation of the exempt status of the organization if it fails to file the required return or notice for three consecutive years. Section 6033(i) and the regulations thereunder require an organization to submit a Form 990-N (with some exceptions not applicable here) if it is not required by section 6033(a)(1) to file Form 990 or Form 990-EZ. Treas. Reg. § 1.6033-6(b)(1) expressly provides that an organization required to file an annual information return under section 6033(a)(1) shall not submit an annual electronic notice under section 6033(i). In other words, an organization whose annual gross receipts normally exceed \$50,000 can neither satisfy its annual reporting obligation nor avoid the automatic revocation provision of section 6033(j)(1)(B) by submitting a Form 990-N. Thus, any organization that fails to file the return required by section 6033(a)(1) for three consecutive years, including an organization identified as part of the Compliance Strategy as having improperly submitted a Form 990-N for a consecutive three-year period, will be revoked by operation of law pursuant to section 6033(j)(1)(B).

The statutory language of the section 6033(j)(1)(A) notification requirement applies where an organization has failed to file the required return or notice for two consecutive years and the Service has no record of such required return or notice for two consecutive years. In those situations, the Service must notify the organization that automatic revocation will occur under subparagraph (B) if the organization fails to file such a return or notice by the due date for the next such return or notice required to be filed.

The relationship between the notification required in section 6033(j)(1)(A) and the automatic revocation provided in section 6033(j)(1)(B) is not expressly delineated in the statute. The legislative history of the Taxpayer First Act does not address whether the notification requirement in section 6033(j)(1)(A) was intended to be a condition precedent to automatic revocation under section 6033(j)(1)(B).²

² See H.R. Rep. No. 116-39, pt. 1, at 101; see also Staff of the Joint Committee on Taxation, Description of H.R. 1957, The "Taxpayer First Act of 2019," 72-73.

The statutory text of section 6033(j)(1)(B) does not condition automatic revocation upon the Service's issuance or the organization's receipt of the notification described in section 6033(j)(1)(A). Instead, the statute sets forth two separate conditional statements. If an organization fails to file the return or notice required under either section 6033(a)(1) or (i) for two years, then the Service must provide the notification described in section 6033(j)(1)(A). If an organization fails to file the return or notice required under either section 6033(a)(1) or (i) for a third consecutive year, then the organization's tax-exempt status is automatically revoked under section 6033(j)(1)(B). The organization's failure to file the required return or notice in the third consecutive year is the only condition required for automatic revocation.

As stated above, under the Compliance Strategy, the Service reviews other returns and forms filed by organizations that submitted Forms 990-N and in the examination process identifies those organizations that were ineligible to submit a Form 990-N under section 6033(i). In these cases, although the organization did not file the form required by section 6033(a)(1), it did submit two or more Forms 990-N. By submitting a Form 990-N, the organization represented to the Service that it was not required to file an annual return under section 6033(a)(1), and that the Form 990-N was the organization's required annual electronic notice. In these cases, it is arguably not accurate to say that the Service has "no record of such a return or notice from such organization for two consecutive years." The Service has a record of the submission of Forms 990-N and would not have had any basis to question an organization's eligibility to submit them prior to undertaking the Compliance Strategy. Therefore, notification within the meaning of section 6033(j)(1)(A) could not have occurred as a practical matter. The notification requirement imposed on the Service is separate from the annual reporting obligation imposed on organizations under section 6033(a)(1) and (i). Thus, lack of notification does not excuse an organization from compliance with its annual reporting obligation, although in certain circumstances, it could be relevant to the determination of whether an organization applying for retroactive reinstatement of its tax-exempt status under section 6033(j)(3) had reasonable cause for its failure to file.

If an organization submitted a Form 990-N for two consecutive years (but not three) and the examination reveals that the organization was ineligible to submit a Form 990-N, the Service must provide the notification required by section 6033(j)(1)(A). The examiner may also determine whether the organization is in compliance with section 501(c)(3).

ii. Opportunity for Appeals Consideration

Automatic revocation under section 6033(j) occurs by operation of law and is not an adverse determination within the meaning of section 7123(c). Therefore, an organization whose tax exemption is automatically revoked generally may not appeal the revocation of its exempt status.³ See Section 12.02 of Rev. Proc. 2022-5.

³ An organization whose exemption is automatically revoked must reapply for exempt status. Rev. Proc.

This limitation on administrative appeals parallels the limitation on declaratory judgment actions with respect to automatic revocation in section 7428. In general, section 7428(a)(1) permits, in pertinent part, an organization to bring an action for declaratory judgment in cases involving a determination of an organization's continuing qualification as an organization described in section 501(c). Section 7428(b)(4), however, provides that no action may be brought with respect to the revocation of exempt status under section 6033(j)(1)(B). Revocation under section 6033(j)(1)(B) is not a reviewable determination within the meaning of section 7428(a)(1), because there is no determination for a court to review. There is similarly no determination for the Independent Office of Appeals to review with respect to an automatic revocation.

Although an organization whose exempt status is revoked by operation of law under section 6033(j)(1)(B) has no declaratory judgment rights and is not eligible to challenge the revocation, including the opportunity for consideration by Appeals, the Tax Exempt & Government Entities Division (TE/GE), with the approval of Appeals, does have discretion to afford organizations the opportunity for Appeals consideration with respect to certain issues. Therefore, where TE/GE has determined in examination that organizations were ineligible to submit the Form 990-N because their annual gross receipts normally exceeded \$50,000 and they would be automatically revoked under section 6033(j)(1)(B), TE/GE, in its and Appeals' discretion, could initiate a policy that would afford such organizations an opportunity for Appeals consideration on the issue of gross receipts. Accordingly, if such a policy were adopted, Appeals could consider and sustain or reverse the decision of EO Examinations as to whether the organization's annual gross receipts normally exceeded \$50,000. If Appeals reverses EO Examinations with respect to its determination of the organization's annual gross receipts, automatic revocation would not occur because the organization would not have failed to file its required annual return or notice for three consecutive years. However, assuming that the Office of Appeals agrees with the Service's examination conclusion that the organization's gross receipts made it ineligible to submit a Form 990-N, automatic revocation would occur,⁴ and Appeals would not have authority to reverse the revocation based on section 6033(j)(1)(B) because such revocation occurs by operation of law.

CONCLUSION

The automatic revocation provision in section 6033(j)(1)(B) is not contingent upon satisfaction of the notification requirement in section 6033(j)(1)(A) and applies to those organizations in the Compliance Strategy determined to have failed to file the required annual return for three or more consecutive years. For organizations in the Compliance Strategy that failed to file the required annual return for two consecutive years,

2014-11, 2014-3 IRB 411, provides procedures for reinstating exempt status after automatic revocation.

⁴ The effective date of revocation of the organization under section 6033(j)(1)(B) would relate back to the filing due date of the third consecutive required annual return that it failed to file, not to the subsequent date of any determination made by Appeals.

notification as described in section 6033(j)(1)(A) must be provided. Tax Exempt & Government Entities may, in its discretion and with the consent of Appeals, afford such organizations that would be automatically revoked without having received notice pursuant to section 6033(j)(1)(A) an opportunity for Appeals to consider TE/GE's determination of the organization's gross receipts.

Please contact Robin W. Denick at (443) 853-5451 if you have further questions

CASEY A. LOTHAMER
Area Counsel
(Tax Exempt & Government Entities Division
Counsel: Mid-Atlantic Area)

By: _____
Robin W. Denick
Senior Counsel (Mid-Atlantic Area Baltimore)
(Tax Exempt & Government Entities Division
Counsel)