



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OFFICE OF
CHIEF COUNSEL

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INTERNAL REVENUE SERVICE NATIONAL OFFICE SERVICE CENTER ADVICE

MEMORANDUM FOR ASSISTANT DISTRICT COUNSEL, KANSAS-MISSOURI

CC:MSR:KSM:KCY
Attn: Dale P. Kensinger

FROM: Acting Assistant Chief Counsel (Income Tax & Accounting)
CC:DOM:IT&A

SUBJECT: Significant Service Center Advice Regarding the Increase of
the Failure to Pay Penalty under Section 6651.

This memorandum is in response to your request for Significant Service Center Advice, dated March 10, 1999. Your request involves an issue regarding when the failure to pay penalty under § 6651 of the Internal Revenue Code increases from 0.5 percent to 1 percent per month. You asked us to address this issue in light of the recent enactment of § 6330, which provides a 30-day period to request a hearing prior to levy. Although you conclude that the period in § 6651(d) is applicable, you express reservations about possible inconsistencies between the period in § 6651(d) and the period in § 6330 and § 6331. For the reasons discussed below, we generally agree with your conclusion, but we do not share your concern about the inconsistencies of the different periods.

ISSUE

When does the failure to pay penalty increase from 0.5 percent to 1 percent under § 6651(d) of the Code?

CONCLUSION

The failure to pay penalty increase from 0.5 percent to 1 percent under § 6651(d) of the Code at the beginning of the month following: (1) the day which is 10 days after the date on which the Service issues a notice under § 6331(d), or (2) the day on which notice and demand for immediate payment is given under the last sentence of § 6331(a).

DISCUSSION

Section 6651(a)(2) of the Code imposes a penalty for failure to pay the amount shown as tax on the return on or before the date prescribed for payment of such tax (determined with regard to any extension of time for payment). The amount of the penalty is 0.5 percent of the amount of unpaid tax if the failure is for not more than one month, with an additional 0.5 percent for each additional month or fraction thereof during which the failure continues, not exceeding 25 percent in the aggregate.

Section 6651(d)(1) of the Code provides that the penalty under § 6651(a)(2) will increase to 1 percent if notice under § 6331(a) or § 6331(d) is given. Under § 6651(d)(2) the increased rate begins at the start of the month after the earlier of: (1) the day which is 10 days after the date on which notice is given under § 6331(d), or (2) the day on which notice and demand for immediate payment is given under the last sentence of § 6331(a).

Section 6330 was added to the Code by § 3401 of the Internal Revenue Restructuring and Reform Act of 1998 (RRA), Pub. L. 105-206, 112 Stat. 685 (1998), and provides that no levy shall be issued prior to notification of the right to a hearing. This notice must be given not less than 30 days prior to the levy. This provision is effective for collection actions initiated after January 18, 1999.

Section 6331 of the Code generally provides rules for levy and distraint. The last sentence of § 6331(a) provides that in a jeopardy situation, notice and demand for immediate payment may be made and collection by levy is lawful without regard to the period of days provided under § 6331(d).

Section 6331(d) of the Code provides that 30 days prior to any levy the Service must provide notice to the taxpayer of the Service's intent to make such levy. Prior to July 1, 1989, notice of intent to levy was only required 10 days before issuance of a levy. See § 6236(a)(1) of the Technical and Miscellaneous Revenue Act of 1988, Pub. L. 100-647, 102 Stat. 3044 (1988).

As stated above, except in a jeopardy situation, § 6651(d) of the Code provides that the failure to pay penalty is increased the beginning of the month after the day which is 10 days from the date the notice of intent to levy under § 6331(d) is given. This 10-day period allows the taxpayer the opportunity to pay the

outstanding liability before the penalty increases to 1 percent. In contrast, under § 6331(d), the taxpayer has 30 days from the date of a notice of intent to levy to pay the outstanding liability before a levy may occur. Additionally, under § 6330 the taxpayer may seek a hearing during this 30-day period. You raise the question regarding whether the 1 percent increased rate for the failure to pay penalty should begin after the 10-day period in § 6651(d) or after the 30-day period in § 6331(d) and § 6330.

We conclude that Congress did not intend that the 30-day period under § 6331(d) or § 6330 affect when the increased failure to pay penalty begins as provided under § 6651(d). We base this conclusion on the following three reasons: (1) each provision has a different purpose, (2) prior congressional action has not amended § 6651(d), and (3) the periods under § 6651(d) and § 6331(d) have always differed.

First, the purpose of the increase in the failure to pay penalty is different from the purpose of the 30-day period in § 6330 and § 6331(d). The purpose of § 6651(d) is to compensate the government for the increased cost of collection. The legislative history states that when the cycle of mailings is completed and the tax has not yet been paid, the IRS must switch to methods of collecting the tax that generally are much more expensive, such as telephoning or visiting the taxpayer. It is at this point, when notice under § 6331 is sent, that the penalty will be increased to 1 percent per month. See H.R. Rep. No. 99-426, at 832 (1985).

However, the purpose of the 30-day periods under §§ 6330 and 6331(d) is different from the purpose of the period under § 6651(d). The purpose of the notice and the 30-day period under § 6330 is to provide protection to taxpayers by providing a meaningful hearing before the Service deprives them of their property. See S. Rep. No. 105-174, at 67 (1998). The purpose of the 30-day period under § 6331 is to provide adequate time between the date of the notice and the date that levy can be made, so that the taxpayer can take appropriate action as provided in the notice. See S. Rep. No. 100-309, at 10 (1988). The purpose of the notice under § 6331 is to provide a description of Code provisions and administrative procedures and appeals applicable to specific aspects of collection, as well as a description of the alternatives available to taxpayers that may prevent a levy on taxpayers' property. *Id.* Thus, while the purpose of § 6330 and § 6331 is to provide the taxpayer with proper notice of available actions that can be taken prior to levy, the purpose of § 6651(d) is to compensate the government for the increased cost of collection.

Second, even when both § 6331(d) and § 6651(d) referred to a 10-day period, the date that the failure to pay penalty increased and the date that levies could be issued were not concurrent. For levies issued before July 1, 1989, § 6331(d) provided that the Service could not levy until 10 days after providing notice of intent to levy. During this time,

§ 6651(d) provided that the failure to pay penalty would be increased from the beginning of the month after the day 10 days from the issuance of the notice of intent to levy. See H.R. Conf. Rep. No. 99-841, II-779 (1986). Although both periods were 10 days long, the increased failure to pay penalty did not begin to run until the month that began 10 days after the notice was sent. For example, if the notice was sent on the first day of a month, the increased penalty would not begin to run until the first day of the following month, which could be a full 28 to 31 days (depending on the month) after the notice was sent. In contrast, the Service could levy immediately on the 11th day after the § 6331(d) notice was sent, regardless of the day of the month on which the notice was sent.

Third, Congress changed the 10-day period to 30 days for § 6331(d) in 1988 and added § 6330 in 1998. In both cases Congress did not amend the time period in § 6651(d). Therefore, it appears that Congress intended to have different time periods for when the penalty is increased and when the Service may levy.

Accordingly, we conclude that the 10-day period in § 6651(d) is applicable despite the fact that § 6330 and § 6331(d) refer to a 30-day period. As you stated in your memorandum, there is no basis for avoiding the literal application of § 6651(d). Thus, we agree with your conclusion that the Service should continue to increase the failure to pay penalty from 0.5 percent to 1 percent beginning the month after the day which is 10 days after the Service has issued a notice under § 6331(d).

If you have any questions or comments regarding this reply, please contact Brad Taylor at (202)622-4940.

HEATHER C. MALOY

By:

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