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DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
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INTERNAL REVENUE SERVICE NATIONAL OFFICE SERVICE CENTER ADVICE

MEMORANDUM FOR DISTRICT COUNSEL, PENNSYLVANIA, PHILADELPHIA

CC:NER:PEN:PHI
Attn: Michael D. Baker

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

SUBJECT: Significant Service Center Advice Regarding the Effective
Date of Section 6651(g) of the Internal Revenue Code

This memorandum is in response to your request for Significant Service Center Advice dated April 14, 1999. In your request you stated that the Service Center is routinely asserting the failure to pay penalty under § 6651(a)(2) of the Internal Revenue Code on § 6020(b) returns prepared with regard to 1995 and 1996 taxable years. The Service Center has interpreted the effective date of § 6651(g) as permitting the assertion of the penalty under § 6651(a)(2) with regard to all 1995 and 1996 federal tax returns.

ISSUE

Whether § 6651(g) is effective for purposes of asserting the failure to pay penalty under § 6651(a)(2) with regard to 1995 and 1996 federal tax returns prepared by the Service under the authority of § 6020(b).

CONCLUSION

Section 6651(g) of the Code is effective for returns due (without regard to extensions) after July 30, 1996. Therefore, the Service may not assert the failure to pay penalty under § 6651(a)(2) of the Code with regard to a 1995 or 1996 federal tax return if the return prepared by the Service under the authority of § 6020(b) was due (without regard to extensions) on or before July 30, 1996. However, the Service may assert the failure to pay penalty under § 6651(a)(2) with regard to a

1995 or 1996 federal tax return prepared by the Service under the authority of § 6020(b) if the return was due (without regard to extensions) after July 30, 1996.

DISCUSSION

Section 6020(b) of the Code provides the Service with the authority to execute a return for any taxpayer who fails to make any return required by any internal revenue law or regulation at the time prescribed, or who makes, willfully or otherwise, a false or fraudulent return.

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 due date prescribed for payment of such tax (with regard to extensions), unless it is shown that such failure is due to reasonable cause and not due to willful neglect.

Section 6651(a)(3) of the Code imposes a penalty for failure to pay any amount in respect of any tax required to be shown on a return, which is not so shown, within 21 calendar days from the date of notice and demand therefor (10 business days if the amount for which such notice and demand is made equals or exceeds \$100,000), unless it is shown that such failure is due to reasonable cause and not due to willful neglect. For a notice and demand given before January 1, 1997, the period for payment was 10 days regardless of the amount for which notice and demand was made.

For returns due before July 31, 1996, the penalty under § 6651(a)(2) of the Code could not be imposed with regard to a § 6020(b) return because a § 6020(b) return is not considered a return prepared by the taxpayer. However, the § 6651(a)(3) penalty could be imposed because this penalty is triggered by nonpayment of tax after notice and demand is given for amounts required to be shown on a return which are not shown on a return. See H.R. Conf. Rep. No. 104-350, at 1489 (1995); H.R. Rep. No. 104-280, at 357 (1995).

In the Taxpayer Bill of Rights 2, Congress enacted § 6651(g)(2) of the Code to provide that for purposes of determining the amount of the addition under § 6651(a)(2) a § 6020(b) return is treated as a return filed by the taxpayer. This provision applies to any return which has a due date (determined without regard to extensions) after July 30, 1996. See section 1301(a) of Taxpayer Bill of Rights 2, Pub. L. 104-168, 110 Stat. 1452 (July 30, 1996).

In the situation you describe, the Service Center is asserting the penalty under § 6651(a)(2) with regard to § 6020(b) returns executed for taxpayers who were required to file 1995 and 1996 federal tax returns with due dates both before and

after the July 30, 1996, effective date of § 6651(g). Based on the clear effective date of § 6651(g), the Service does not have the authority to impose the § 6651(a)(2) penalty with regard to § 6020(b) returns relating to 1995 and 1996 returns due (without regard to extensions) on or before July 30, 1996. However, as previously discussed, the Service may impose the § 6651(a)(3) failure to pay penalty with regard to returns prepared by the Service under the authority of § 6020(b) whether due before July 31, 1996, or after July 30, 1996, as long as appropriate notice and demand has been given.

Accordingly, the Service must abate the § 6651(a)(2) penalty (but not the § 6651(a)(3) penalty) with regard to § 6020(b) returns executed for taxpayers whose federal tax returns were due (without regard to extensions) on or before July 30, 1996. In addition, the Service must discontinue procedures allowing imposition of the penalty under § 6651(a)(2) for § 6020(b) returns regarding federal tax returns due on or before July 30, 1996, and only impose the penalty under § 6651(a)(3) (when applicable) for these returns.

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

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