

Congress, not the IRS, should take the lead in implementing broad-based civil tax penalty reform, an IRS official said October 26.

The IRS has been talking internally about the need for penalty reform because of the many reg projects pertaining to penalties that are in the works, said Matthew S. Cooper, branch 1 senior technical reviewer in the IRS Office of Associate Chief Counsel (Procedure and Administration). But ultimately it is up to Congress to institute reform, he said.

"I think our position is Congress needs to really take the initiative in doing this, with tax reform as a whole," said Cooper, speaking at the New York University School of Continuing and Professional Studies annual Institute on Federal Taxation in New York.

In the meantime, the IRS will continue working on numerous penalty reg projects, Cooper said. Those projects include regs for the section 6662 accuracy-related penalty, the section 6662A penalty for understatement of reportable transactions, the section 6664 reasonable exception clause, the section 6676 penalty for erroneous refund claims, and the section 6707A penalty for failure to disclose reportable transactions.

Miriam L. Fisher, a partner with Morgan, Lewis & Bockius LLP in Washington, said that in her experience as a practitioner, the IRS did not consistently impose penalties until the last 10 years or so, but now does so "really routinely in cases where you wouldn't have anticipated seeing them prior to that."

According to the IRS data book, accuracy-related penalties have increased significantly in the past five years. In fiscal 2010, the number of individual accuracy-related civil penalties assessed was about 469,000, an eightfold

increase over fiscal 2005, when the number was about 58,000. The number of corporate accuracy-related penalties tripled to 3,640 in fiscal 2010 from 1,342 in fiscal 2005. (For the 2010 IRS data book, see Doc 2011-5320 or 2011 TNT 50-18 (Embedded image moved to file: pic23353.gif)
2011 TNT 50-18: Other IRS Documents.)

The reason for the increase in penalties is twofold, said Bryan C. Skarlatos, a partner with Kostelanetz & Fink LLP in New York. One is the number of tax shelter cases that are under audit and moving through the Tax Court. Also, IRS agents and the Office of Chief Counsel are becoming more aware of the laws and procedures that allow them to assess penalties, and the Tax Court is sustaining penalty assertions more frequently, Skarlatos said.

"What we really have is an environment in which the penalties are being assessed a lot more, being sustained a lot more, and that's just becoming a matter of course," Skarlatos said.

The Taxpayer Advocate Service and organizations such as the American Bar Association and the American Institute of Certified Public Accountants have issued reports on the need for penalty reform. The ABA in a 2009 white paper wrote that "revisions to the federal civil tax penalty regime over the past two decades have not been grounded in a single, sound policy of tax administration," and argued that Congress must "include penalty reform as part of any tax simplification efforts." (For the ABA paper, see Doc 2009-9001 or 2009 TNT 75-25 (Embedded image moved to file: pic20015.gif)
2009 TNT 75-25: Congressional Tax Correspondence.)

Preparer Penalties

Karen Hawkins, director of the IRS Office of Professional Responsibility, said the IRS is increasingly looking to determine whether return preparer sanctions can be imposed when a section 6662 penalty is assessed.

"If you happen to be the adviser or appraiser who is involved in evaluation issues or just the positions on the return, the next step is -- and the Service is becoming much more conscious of this -- making a determination as to whether the preparer or the adviser should have a preparer penalty under 6694," Hawkins said. "The next step after that is whether they should be referred to the Office of Professional Responsibility for a fitness determination."

Hawkins said OPR is becoming more conscientious about keeping track of practitioner penalty referrals sent to the office. In the past, OPR tracking of penalties had been haphazard because the office let the field use its discretion to decide whether to send in referrals, she said.

To determine whether to impose practitioner sanctions under Circular 230 based on referrals, OPR would need to see a pattern of infractions, Hawkins said. She defined a pattern as "something more than a single taxpayer over multiple years with the same adjustments." She continued, "For me a pattern is multiple taxpayers, multiple kinds of issues, multiple adjustments."

OPR Staffing

OPR is projected to add about 40 positions over the next couple of years to deal with oversight of the new return preparer regulations, Hawkins said.

When she started, OPR had funding for 56 positions, she said. The office lost about 25 people to the Return Preparer Office when it was created, but OPR is projected to grow to 76 positions in a couple of years. Those positions will primarily be for lawyers and paralegals, Hawkins said. (For prior coverage, see

Doc 2011-22301 or 2011 TNT 205-15 (Embedded image moved to file:
pic00446.gif)2011 TNT 205-15: News Stories.) (_?_0?#_?"