

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

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subject: Section 6651(a)(3) "Payment Date"

This Chief Counsel Advice responds to your request for assistance. This advice may not be used or cited as precedent.

ISSUE

Whether the "payment date" for purposes of calculating the failure to pay addition to tax under section 6651(a)(3) and for ascertaining whether the taxpayer exercised ordinary business care and prudence is the last date specified on the notice and demand for payment or the due date of the tax return (without regard to any extension of time for filing).

CONCLUSION

The "payment date" for purposes of calculating the failure to pay addition to tax under section 6651(a)(3) and for ascertaining whether the taxpayer exercised ordinary business care and prudence is the last date specified on the notice and demand for payment.

## FACTS

Taxpayer timely files a Form 1040, U.S. Individual Income Tax Return. The Service examines the taxpayer's return, which results in a deficiency. After the issuance of a statutory notice of deficiency, the taxpayer defaults or petitions and loses in Tax Court. The Service Center then assesses the deficiency and records the assessment using Transaction Code 300. Upon assessment, the Service issues a notice and demand for payment. The taxpayer does not pay the amount of tax stated in the notice and demand within the time period specified on the notice and demand.

## LAW AND ANALYSIS

### A. Calculation of Addition

There are two different types of failure to pay additions to tax contained in section 6651 of the Code: subsections 6651(a)(2) and 6651(a)(3). Section 6651(a)(2) provides that an addition to tax applies to a taxpayer who reports an amount of tax due on his return but fails to pay it by the payment due date. The addition to tax is 0.5 percent per month of the amount of tax shown on the return, but unpaid, for each month that payment is overdue, until the addition to tax reaches a maximum of 25 percent. On the other hand, section 6651(a)(3) provides for an addition to tax upon the 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 notice and demand is made equals or exceeds \$100,000). The addition to tax under section 6651(a)(3) is 0.5 percent of the amount of tax stated in the notice and demand for each month that the failure to pay continues, until the addition to tax reaches a maximum of 25 percent. Neither failure to pay addition to tax is imposed if the taxpayer shows that the failure to pay was due to reasonable cause and not to willful neglect. I.R.C. § 6651(a)(2) and (3).

The failure to pay addition to tax under section 6651(a)(3) applies to amounts subsequently assessed while the failure to pay addition to tax under section 6651(a)(2) applies to unpaid amounts showing due on the return as originally filed. Accordingly, a section 6651(a)(2) addition to tax is calculated from the payment due date, which is generally the same as the due date for filing the return without regard to extensions of time for filing. See I.R.C. § 6151(a). In contrast, no section 6651(a)(3) addition to tax can be owed for the period that precedes 21 calendar days after notice and demand for payment of tax is made (10 business days for amounts at or above \$100,000). Thus, we believe the "payment date" for purposes of calculating the failure to pay addition to tax under section 6651(a)(3) is the last date specified on the notice and demand for payment, not the original due date of the return.

This conclusion is plainly supported by the Regulations on Procedure and Administration under section 6651. See Treas. Reg. § 301.6651-1(f), Example (1)(b). In Example (1)(b), a notice and demand for a deficiency is issued on January 8, 1971,

but the taxpayer does not pay the deficiency until December 23, 1971. The addition to tax under section 6651(a)(3) is computed in the example from January 19, 1971; the last date specified on the notice and demand for payment.<sup>1</sup>

B. Reasonable Cause

Section 301.6651-1(c)(1) provides that a failure to pay will be considered to be due to reasonable cause when the taxpayer makes a satisfactory showing that he exercised ordinary business care and prudence in providing for payment of his tax liability and was either unable to pay the tax or would suffer an undue hardship (as described in Treas. Reg. § 1.6161-1(b)) if the tax was paid on the due date. The regulations also provide that a taxpayer will be considered to have exercised ordinary business care and prudence if he made reasonable efforts to conserve sufficient assets in marketable form to satisfy his tax liability and nevertheless was unable to pay all or a portion of the tax when the tax became due. Treas. Reg. § 301.6651-1(c)(1). In addition, various courts have stated that the reasonable cause standard is a one-time test to be passed or failed at the payment due date. Estate of Hartsell v. Commissioner, T.C. Memo. 2004-211; Indus. Indem. v. Snyder, 41 Bankr. 882, 883 (E.D. Wash. 1984). Events occurring after the payment due date, however, are not irrelevant to the reasonable cause determination. See Estate of Hartsell, T.C. Memo. 2004-211; Estate of Sowell v. United States, 198 F.3d 169, 172-173 (5th Cir. 1999) (asserting that post-date events could not stop penalties from accruing, but were relevant in rebutting taxpayer's argument that it used ordinary care and prudence in attempting to pay tax before it was due). Consequently, we believe that the last date specified on the notice and demand is also the payment date from which to ascertain whether the taxpayer exercised ordinary business care and prudence. See Treas. Reg. § 301.6651-1(c)(1); Estate of Hartsell, T.C. Memo. 2004-11; see also Treas. Reg. § 1.6161-1(a)(2) (extending the time for payment of any amount determined as a deficiency from the date fixed for payment of the deficiency, as shown on the notice and demand).

Based on the foregoing, we conclude that the "payment date" for purposes of calculating the failure to pay addition to tax under section 6651(a)(3) and for ascertaining whether the taxpayer exercised ordinary business care and prudence is the last date specified on the notice and demand for payment, not the original due date of the return.

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

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<sup>1</sup> Section 303(b)(2) of Pub. L. No. 104-168 amended section 6651(a)(3) to substitute "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)" in place of "10 days of the date of the notice and demand therefore." The example was written when a taxpayer had only 10 days from the date of notice and demand to pay.

If you have any questions, please contact this office at (202) 622-4940.