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From: [REDACTED]

Sent: Tuesday, September 24, 2024 12:17:16 PM

To: [REDACTED]

Cc: [REDACTED]

Bcc:

Subject: 6651 Failure-to-file penalty with SFR preparation

Hi [REDACTED],

We were asked whether a taxpayer who fails to file a return may be subject to a penalty under IRC § 6651(a)(1) for failure to file even if the Secretary creates a Substitute For Return (SFR) pursuant to IRC § 6020. The answer is that the taxpayer may be subject to the penalty, as the SFR is disregarded for purposes of this determination.

Section 6651(a) distinguishes between the penalties for failure to file (paragraph (1)) and failure to pay (paragraphs (2) and (3)). Section 6651(g) makes this same distinction for SFRs: Section 6651(g)(1) provides that a return prepared by the Secretary “shall be disregarded for purposes of determining the amount of the addition under paragraph (1) of subsection (a),” the paragraph authorizing the failure-to-file penalty (emphasis added). In contrast, § 6651(g)(2) provides that an SFR “shall be treated as the return filed by the taxpayer” for additions “under paragraphs (2) and (3) of subsection (a),” the paragraphs authorizing penalties for failure to pay. This distinction also appears in 26 C.F.R. § 301.6651-1: “A return prepared by the Secretary under section 6020(b) will be disregarded for purposes of determining the amount of the addition to tax for failure to file any return pursuant to paragraph (a)(1) of this section. However, the return prepared by the Secretary will be treated as a return filed by the taxpayer for purposes of determining the amount of the addition to tax for failure to pay the tax shown on any return and for failure to pay the tax required to be shown on a return that is not so shown pursuant to paragraphs (a)(2) and (3) of this section, respectively” (emphasis added).

When an SFR is prepared for a taxpayer, the SFR is disregarded for purposes of determining liability for the failure-to-file penalty. As a result, if the taxpayer has failed to file a return, their liable for the failure-to-file penalty is determined solely based on that failure and is unaffected by preparation of an SFR.

Thanks.

[REDACTED]

