

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

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to: John McInelly  
Program Manager  
(Office of Servicewide Penalties)

from: Meghan Howard  
Senior Technician Reviewer, Branch 1  
(Procedure & Administration)

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subject: Applicability of Revenue Procedure 84-35 to Partnerships with Taxable Years beginning on or after January 1, 2018

This memorandum responds to your request for assistance dated August 30, 2019. This advice may not be used or cited as precedent.

### **Issues**

Whether the relief granted to small partnerships by Revenue Procedure 84-35, 1984-1 C.B. 509, relating to the penalty under section 6698(a) for failure to file a partnership return, is obsolete.

If the revenue procedure is not obsolete, whether Revenue Procedure 84-35 allows the IRS to implement procedures to ensure that partnerships claiming relief under Revenue Procedure 84-35 are in fact entitled to such relief.

### **Conclusion**

Revenue Procedure 84-35 is not obsolete and continues to apply. The reference to section 6231(a)(1)(B) contained in the revenue procedure is a means by which to define small partnerships for the purpose of the relief provided by the revenue procedure. The repeal of the small partnership exception in section 6231(a)(1)(B) does not affect the scope of the penalty under section 6698 for failure to file a partnership return.

Revenue Procedure 84-35 allows the IRS to implement procedures requiring partnerships claiming relief under Revenue Procedure 84-35 to demonstrate that they are entitled to this relief.

### **Analysis**

A partnership that fails to timely file a partnership return as required by section 6031(a) is subject to a penalty under section 6698, unless the failure to comply with section 6031(a) is due to reasonable cause. I.R.C. § 6698.

Congress enacted section 6698 in 1978 as part of Pub. L. No. 95-600, 92 Stat. 2763. In legislative history, Congress indicated that it intended for the reasonable cause exception to the section 6698 penalty to apply automatically to small partnerships that meet certain criteria. The Conference Committee Report stated:

The penalty will not be imposed if the partnership can show reasonable cause for failure to file a complete or timely return. Smaller partnerships (those with 10 or fewer partners) will not be subject to the penalty under this reasonable cause test so long as each partner fully reports his share of the income, deductions and credits of the partnership.

H.R. Rep. No. 95-1800, at 221 (1978) (Conf. Rep.).

Revenue Procedure 81-11 set forth procedures, consistent with the legislative history, under which partnerships with ten or fewer partners would not be subject to the section 6698 penalty for failure to file a partnership return.

Shortly after the issuance of Revenue Procedure 81-11, Congress enacted a definition of small partnership as part of the Tax Equity and Fiscal Responsibility Act (TEFRA) of 1982, Pub. L. 97-248. Section 6231(a)(1)(B), as enacted in TEFRA, provided that the term “partnership,” for purposes of sections 6221 through 6232, did not include a partnership if the partnership had 10 or fewer partners, each of whom is a natural person (other than a nonresident alien) or an estate, and each partner’s share of each partnership item is the same as such partner’s share of every other item. A husband and wife, and their estates, were treated as one partner in determining whether the partnership had 10 or fewer partners for purposes of section 6231(a)(1)(B). TEFRA did not amend section 6698 or redefine the scope of the penalty for failure to file a partnership return.

To conform the relief provided in Revenue Procedure 81-11 to the definition of small partnership newly provided by section 6231(a)(1)(B), the IRS issued Revenue Procedure 84-35 to modify and supersede Revenue Procedure 81-11. Revenue Procedure 84-35 cited the definition of small partnership provided by section 6231(a)(1)(B). In order to qualify for the relief provided in Revenue Procedure 84-35, the partnership must come “within the exceptions outlined in section 6231(a)(1)(B) of

the Code.” See Rev. Proc. 84-35, § 3.01. In citing section 6231(a)(1)(B), Revenue Procedure 84-35 was referencing law that existed at the time the revenue procedure was issued. The IRS did not express an intent that later amendments to TEFRA audit procedures would affect application of the exception to the partnership failure to file penalty.

Section 6231(a)(1)(B) was repealed by the Bipartisan Budget Act of 2015, Pub. L. No. 114-74, 129 Stat. 584 (BBA). The BBA rules, including the repeal of section 6231(a)(1)(B), are generally applicable to partnerships with taxable years beginning after December 31, 2017. The BBA provisions automatically apply to a partnership unless the partnership files a partnership return electing out of the BBA regime. See I.R.C. §§ 6221(b), 6241(1); Treas. Reg. § 301.6221(b)-1. Thus, the BBA rules are applicable to such partnerships for which the relief provided in Revenue Procedure 84-35 would be relevant.

A question was raised concerning how to interpret Revenue Procedure 84-35 now that section 6231(a)(1)(B) has been repealed and will be inapplicable to any partnership for which the relief provided in Revenue Procedure 84-35 is relevant. Significantly, the reference in Revenue Procedure 84-35 to IRC section 6231(a)(1)(B) is a reference to IRC section 6231(a)(1)(B) as it was in effect when Revenue Procedure 84-35 was originally issued. Thus, it is irrelevant that there does not exist any current section 6231(a)(1)(B) that is generally effective and applicable to partnerships seeking relief under Revenue Procedure 84-35. Moreover, the legislative history of section 6698, which is the basis for the relief provided in Revenue Procedure 84-35, is still relevant, and the scope of the section 6698 penalty for failure to file a partnership return has not been affected by the repeal of the TEFRA provisions. Thus, Revenue Procedure 84-35 is not obsolete and continues to apply.

Revenue Procedure 84-35 provides that in order to qualify for the relief provided in the revenue procedure, the partnership, or any of the partners, must establish, if so requested by the IRS, that all partners have fully reported their shares of the income, deductions, and credits of the partnership on their timely filed income tax returns. Rev. Proc. 84-35, § 3.01. Additionally, the revenue procedure states that all the relevant facts and circumstances will be taken into account in determining whether a partner has fully reported the partner’s share of the income, deductions, and credits of the partnership. Rev. Proc. 84-35, § 3.04. Accordingly, the IRS may develop procedures in accordance with Revenue Procedure 84-35 to ensure that any partnership claiming relief is in fact entitled to such relief.

Please feel free to call (202) 317-6845 if you have any further questions.