

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

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to: John McInelly
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(Procedure & Administration)

subject: Notice and Demand Letter Disruption Due to COVID-19 Emergency

Issue

If the Service sends notice and demand letters under circumstances where it will not be feasible to determine the precise date that the letters are issued, does the Service have legal authority to grant relief from penalties and interest tied to the mailing of the letters by treating letters mailed as of a date known to be after their actual date of mailing?

Short Conclusion

Section 7508A would authorize this relief if the need for the relief is identified in a publicly issued notice. Absent the use of authority under section 7508A, the Secretary's inherent discretion in administering and enforcing federal tax laws arguably grants the ability to provide relief. This discretion has never been used to provide relief from statutorily-imposed interest, and granting relief in these circumstances presents significant policy issues.

Background

IRS Centralized Print Sites (CPS) at the Ogden Campus and in Detroit were closed beginning in late March due to the COVID-19 pandemic emergency. Since then, the Service has not been able to send out any letters to taxpayers, including letters providing notice and demand for payment. Under I.R.C. § 6303, the Service is required to send notice and demand for payment within 60 days of assessing any tax.¹ Furthermore, the Code provides specific rules for how interest accrues on tax liabilities and penalties depending on whether the taxpayer pays within 21 or 10 days of the

¹ As explained in previous advice to the Office of Servicewide Penalties, we do not believe failure to timely send the notice and demand invalidates the assessment. [REDACTED]

notice and demand. See I.R.C. §§ 6601(e)(2); (e)(3); 6651(a)(3).

Notice and demand letters are normally printed automatically upon assessment and sent to the taxpayer the same day except when the assessment is made prior to the payment due date. Section 6303(b) provides that the IRS may not issue a notice that demands payment prior to the payment due date.² In the case of assessments made prior to the payment due date, programming uses the payment due date in determining the notice and demand date for purposes of penalty and interest provisions. Programming uses the date of assessment to determine the notice and demand date for all other assessments. Notice and demand letters generated by assessments beginning in late March are currently waiting in the printing queue in IRS campuses, but have not been printed and mailed due to the COVID-19 disruption. The computer system continues to assess tax and generate notice and demand letters automatically. The Information Technology department (IT) expects to be able to stop most but not all of these automatic assessments by June 1, 2020, at which point there will be between one and two million notice and demand letters in the queue excluding letters for assessments of unpaid tax liabilities whose payment is postponed by Notice 2020-23.³ Voiding these automatically generated notice and demand letters and creating new letters would be extremely burdensome and compromise the ability to send the letters timely upon campus reopening.

The IRS has two options to respond to this situation. The option proposed by the Office of Servicewide Penalties (OSP) is to send the queued notice and demand letters as originally printed when CPS reopens. Under the assumption that CPS is able to open at 50% capacity in early June, OSP believes that CPS will have a capacity to send one million letters each week. By prioritizing the delayed notice and demand letters, CPS will be able to send all the delayed letters within two weeks, likely no later than June 19th, 2020. This prediction is subject to some uncertainty. The second option under consideration is to delete the queued notices and demand letters and regenerate them with dates printed on them that match the date the notices are mailed. The second option would allow for the computer system to correctly calculate the accrual of section


² In this instance, the 60-day period in section 6303(a) is measured from the payment due date and not the assessment date.

³ The computer system has also automatically generated and sent to the queue notice and demand letters for assessments of unpaid tax liabilities whose payment has been postponed by Notice 2020-23. Although postponed until July 15, the last day prescribed for payment under section 6303(b) is the return due date, e.g., April 15 for 2019 income tax returns. Treas. Reg. 301.7508A-1(b)(4) provides: "To the extent that other statutes may rely on the date a return is due to be filed, the postponement period will not change the due date of the return." Because section 6303(b) prohibits the Service from demanding payment of assessments based on 2019 returns made prior to the payment due date, the computer-generated notice and demand letters for these assessments on April 15 and added them to the queue. Notice and demand letters for assessments of 2019 tax liabilities made after April 15 have also been generated and sent to the queue. If mailed prior to July 15, newly-created Notice 1052-A will be included with these letters notifying the taxpayer that payment is not due until July 15, notwithstanding the payment deadline in the notice.

6651(a)(3) penalty and interest on section 6651(a)(2) and (a)(3) penalties. However, the Service will not be able to print and mail the notices within the 60-day time period prescribed by section 6303.⁴

Under the first option, it would not be administratively feasible to document when each notice and demand letter is sent out and to correct the notice date recorded in the computer system for each individual module. The computer, as currently programmed, will erroneously charge a section 6651(a)(3) penalty (for failure to pay upon notice and demand) and interest on any section 6651(a)(2) and (3) penalties if the taxpayer does not pay by the payment date listed on the notice, for the period after the date printed on the notice.⁵ To fix this problem, OSP has proposed to change the accrual date for the applicable penalties and interest from the original date printed on the notice to avoid overcharging taxpayers. OSP has suggested two possibilities for how to change the accrual: (A) to the date the last of the delayed notices is actually sent out, or (B) to July 15, 2020. The advantage of possibility (A) is that it is based on the dates the notices are sent, such that relief is only being granted to the date before which we cannot document that the notices have been sent. The advantage of possibility (B) is that it provides a clear and definite date from which penalties and interest will be charged, which can be communicated to the public. IT will also program the computer not to charge a section 6651(a)(3) penalty or interest if the tax is paid within 21 calendar days (10 business days for amounts equal to or greater than \$100,000) from the accrual date chosen.⁶ OSP has asked whether there is legal authority to provide penalty and interest relief beyond 21/10 days after the date the notice and demand is mailed.

Example of relief applied to a timely filed return: Taxpayer files a Form 941 for the first quarter of 2020 on April 13, 2020, showing a \$10,000 balance due. This is processed and assessed, and an initial notice and demand letter dated May 1, 2020 is generated for the tax liability. April 30 is the date payment is due and pursuant to section 6303(b) the IRS is not permitted to send a notice and demand prior to the payment due date. The letter lists May 22, 2020—21 days after May 1, 2020—as the last day to pay to avoid additional penalties and interest. The programming is set such that if payment is not received by May 22, 2020, interest and the failure to pay penalty

⁴ Tax transcripts for reprinted notice and demand letters will show the date the letters were mailed and this date will in most cases be more than 60 days after the assessment date on the transcripts. 

⁵ As discussed below, section 6651(a)(3) penalty and interest on section 6651(a)(2) and (3) penalties accrue as of the date notice and demand for payment is made.

⁶ The queued notice and demand letters for assessments of unpaid tax liabilities whose payment has been postponed by Notice 2020-23 do not need any change in programming to correctly calculate penalties and interest. Under the authority provided by Notice 2020-23, the Service has implemented programming to prevent any imposition of penalties or interest prior to July 15, 2020.,

are added, accruing as of April 30, 2020, the return due and payment due date. Due to CPS closure, however, the notice was not printed or mailed. Following CPS reopening, under the proposal, the IRS will send out the original letter with its May 1, 2020 date and requirement to pay by May 22, 2020. However, no penalty and interest will be imposed if taxpayer pays by July 15, 2020 or, if later, 21/10 days after the last of the delayed notice and demand letters is mailed. If taxpayer does not pay timely, interest on the tax liability and the failure to pay penalty are, added accruing as of the return due date, and interest on the failure to pay penalty is added, accruing as of the date the last letter of the delayed notice and demand letters is sent. As a result, taxpayer will never owe more penalty and interest than they would have owed if the notice and demand were generated on the day the notice and demand is in fact mailed. In addition, taxpayer may have more than 21/10 days to pay after notice and demand to avoid interest in penalties. This will occur in cases where the notice and demand was actually mailed to taxpayer more than 21/10 days before July 15, 2020.⁷

Discussion

Statutory Penalty and Interest Rules

Interest on an underlying deficiency. This interest accrues from the last day for payment of the tax, generally the return due date (RDD) for the tax, without regard to any extension of time to file or pay. I.R.C. § 6601(a)-(b).

Failure to file penalty. I.R.C. § 6651(a)(1). This penalty accrues from the RDD for the tax with respect to which it is imposed. Interest on the penalty accrues as of the RDD as well and ends on the date of payment of the penalty. I.R.C. § 6601(e)(2)(B).

Failure to pay an amount shown on a return. I.R.C. § 6651(a)(2). This penalty accrues from the RDD for the tax with respect to which it is imposed. Interest on the penalty accrues as of the notice and demand, and no interest is imposed if the penalty is paid within the 21/10 days after the initial notice and demand. I.R.C. § 6601(e)(2)(A).

⁷ In the case of an untimely filed return, the assessment will be made reflecting the tax, the failure to file penalty, and the failure to pay penalty, along with interest from the RDD on the tax and failure to file penalties. If the taxpayer pays within the later of 21/10 days from the date the last delayed notice and demand is mailed or July 15, no further penalties or interest will accrue. If the taxpayer does not pay within this timeframe, additional failure to file and failure to pay penalties will accrue as appropriate; additional interest will be applied to the tax and the failure to file penalties from the date the last delayed notice and demand is mailed; and interest will be applied to the failure to pay penalty from the date the last delayed notice and demand is mailed.

In the case of an additional amount to be assessed after examination, the notice and demand will contain the amount of the tax liability with interest accruing from the RDD. If the taxpayer pays within the later of 21/10 days from the date the last delayed notice and demand is mailed or July 15, no failure to pay penalty or additional interest will be imposed. If the taxpayer does not pay within this timeframe, additional interest will accrue and the failure to pay penalty will be imposed as of the date the last delayed notice and demand is mailed.

Failure to pay an amount required to be shown on a return and not so shown within 21/10 days of the notice and demand. I.R.C. § 6651(a)(3). This penalty accrues from the date of the notice and demand. Interest on the penalty also accrues as of the notice and demand, and no interest is imposed if the penalty is paid within the 21/10 days after the initial notice and demand. I.R.C. § 6601(e)(2)(A).

In all cases, if any payment is made within 21/10 days of the notice and demand being made, interest is not imposed on the amount paid from the date of the notice and demand to the date of payment. I.R.C. § 6601(e)(3).

Enforcement discretion

As part of the Commissioner's responsibility for administering and enforcing federal tax laws, the Service has the discretion to refrain from taking enforcement actions. I.R.C. §§ 7801, 7803; Heckler v. Chaney, 470 U.S. 821, 831 (1985). This authority stems in part from the IRS' need to "choos[e] how to allocate finite enforcement resources." Id. at 842.

The IRS has applied this discretion through Policy Statement 20-1, IRM 1.2.1.12.1(7), which states that, "[i]n limited circumstances where doing so will promote sound and efficient tax administration, the Service may approve a reduction of otherwise applicable penalties or penalty waiver for a group or class of taxpayers as part of a Service-wide resolution strategy to encourage efficient and prompt resolution of cases of noncompliant taxpayers."

The penalty and interest relief proposed does not clearly fall under Policy Statement 20-1. Regarding penalties, the limited circumstances described in the Policy Statement involve a "resolution strategy" for "prompt resolution of cases of noncompliant taxpayers." In other words, the reduction authority is appropriate where penalty relief enhances voluntary compliance, leads to noncompliant taxpayers complying with their tax obligations, and avoids resource-intensive enforcement activities. For example, the first-time abatement policy, by permitting the Service to abate some penalties for generally compliant taxpayers without necessitating a reasonable cause analysis, may lead a taxpayer to voluntarily comply and avoid the Service expending resources to defend the underpayment and penalty from the taxpayer's challenge. The relief here, like the first-time penalty abatement, applies in a situation where many of the cases are likely to meet a "reasonable cause" exception to the penalties involved—here because of the COVID-19 disruptions—such that the penalty reduction is arguably a sound and efficient allocation of agency resources. Relief may promote tax compliance by leading taxpayers to pay the tax they owe promptly rather than embarking on prolonged challenges to the penalty. However, because the relief is automatic and is not limited to otherwise compliant taxpayers, the tax compliance promoted is not much greater than that which can be assumed for *any* penalty relief.

Interest relief does not clearly follow from the Commissioner's administration and

enforcement discretion. First, Policy Statement 20-1 does not apply to interest. Second, while penalty relief is inherently a matter of enforcement discretion, the reasoning underlying that discretion does not apply to interest. Imposing penalties requires expending resources on assessing whether penalties are warranted, prioritizing which penalties to pursue in various cases, and determining whether the Service is likely to succeed in pursuing penalties. See Chaney, 470 U.S. at 831 (“an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency’s overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing”). In contrast, interest generally does not require factual findings beyond the due date of the tax or penalty liability and is not subject to reasonable cause exceptions or abatement authority. Interest is applied mechanically. In part, it reflects the time-value of money and the Service has historically not exercised discretion to reduce it. As a result, the reasons for agency discretion to refrain from enforcement actions generally do not apply to interest, and interest relief is likely not justified by the Secretary’s enforcement discretion.

The Secretary’s discretion in administering the tax laws, however, might provide a basis for the interest relief proposed. Under current circumstances, interest relief would alleviate a great administrative burden from the Service of determining the date that interest starts running, which implicates the same resource allocation concern that underlies agency enforcement discretion in Heckler. The Service cannot use the dates appearing on the notice and demand letters to calculate penalties and interest because that choice would result in overcharging taxpayers. To delete the letters and regenerate them would allow for accurate calculation of penalties and interest, but that choice would stretch thin the Service’s limited resources during the COVID-19 emergency and would run afoul of the statutory mandate to send notice and demand within 60 days of assessment. Whichever option the Commissioner chooses is problematic.

It must be stressed, however, that the IRS has never used administrative discretion to provide relief from interest that would otherwise be imposed by statute. There is no published guidance allowing for interest relief and the legal application of interest is not a matter for compromise when litigating tax cases.⁸ To the contrary, the government consistently asserts that interest is assessed as provided by law and is not subject to equitable or other considerations. This approach has been endorsed and approved by the courts. For example, in Fleet Boston Financial Corp. v. United States, the Court of Appeals for the Federal Circuit rejected taxpayer’s argument based on equity and fairness because it was “not the regime created by the pertinent statute and regulations”

⁸ The factual basis for the imposition of or start date of interest may be the subject of compromise.

and “[t]hose legal prescriptions, not general notions of rough equity, govern this highly technical tax question” concerning the proper amount of interest imposed under I.R.C. 6601. 483 F.3d 1345, 1353 (Fed. Cir. 2007).

Section 6404 interest abatement

Section 6404(e) allows the Service to abate interest that is attributable to unreasonable errors and delays by an officer or employee of the Service in performing a ministerial or managerial act. Section 6404(e) only applies to interest on any deficiency in tax as defined in section 6211 or payment of any tax described in section 6212(a) and thus is only available for income, gift, estate, generation-skipping, and certain excise taxes. Treas. Reg. §§ 301.6404-2(a)(1). Section 6404(e) interest abatement is not available for employment taxes and excise taxes not subject to deficiency procedures. A managerial act is an administrative act involving a loss of records or an exercise of judgment or discretion relating to the management of personnel. Treas. Reg. §§ 301.6404-2(b)(1). A ministerial act is a procedural or mechanical act not involving the exercise of discretion that occurs after all prerequisites to the act have taken place. Treas. Reg. §§ 301.6404-2(b)(2). The act of mailing a notice and demand does not relate to a deficiency in tax defined in section 6211 but could relate to a payment of tax. The delay in mailing notice and demand due to the government-required CPS closure is neither due to a managerial nor ministerial act. Once the print sites reopen, the Service’s choice of the order in which suspended notices are printed and mailed is not a ministerial act because it is not a mere procedural or mechanical action; instead, such a choice is an exercise of discretion by the Service. Such a decision is also not a managerial act because it involves a general administrative decision over how the Service’s resources are to be deployed. Treas. Reg. § 301.6404-2(b)(1) makes clear that the order in which returns are processed is not a managerial act. In any event, the Service is currently planning to print all notice and demand letter first when the print sites reopen. Because the delays due to the COVID-19 disruptions and the order in which notices are printed and mailed are neither ministerial nor managerial acts, this section does not provide authority for the proposal.

Section 7508A

Section 7508A(a) empowers the Service to postpone certain tax-related deadlines when the Secretary determines that a taxpayer is affected by a federally declared disaster or national emergency. Here, section 7508A(a)(2) could support the proposed penalty and interest relief by defining as affected taxpayers who experience delays in receiving notice and demand letters. In present circumstances, published notices set forth the determination by the Secretary that a taxpayer is an affected taxpayer for purpose of section 7508A, as well as the specific acts qualifying for postponement. Postponement typically extends to certain taxpayer acts. However, the authority in section 7508A to postpone time-sensitive acts extends to certain government acts as well. See I.R.C. § 7508A(a)(1) (incorporating by reference section 7508(a)(1), which references assessment, collection, and the giving or making of any notice or demand for payment of any tax); and Treas. Reg. § 301.7508A-1(c)(2) (delineating certain government acts

that may be postponed, including the giving or making of any notice or demand for the payment of any tax). Notice 2020-23, for example, recently determined that certain persons were affected taxpayers for the limited purpose of postponing due dates with respect to certain government acts concerning the affected taxpayers. See Notice 2020-23, Section III D (defining as “affected taxpayers” persons under examination or with cases before the Independent Office of Appeals, among others, and postponing for 30 days government acts listed in Treas. Reg. § 301.7508A-1(c)(2)).

Conclusion

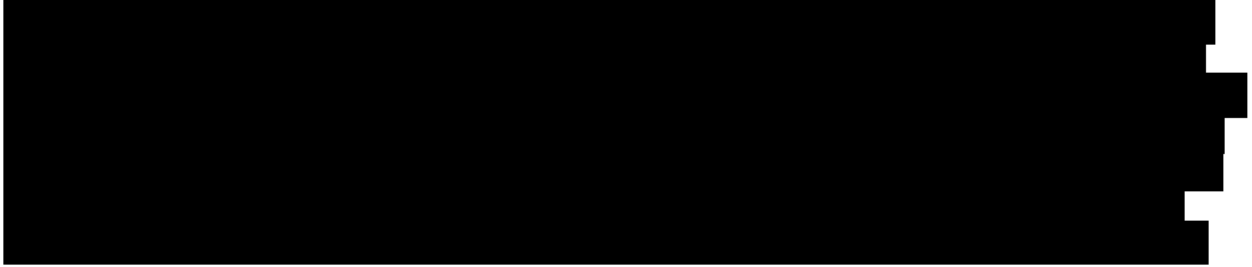
In conclusion, Service is faced with a tax administration choice between providing relief from penalties and interest or failing to send notice and demand letters timely. Section 7508A would authorize this relief if the need for the relief is identified in a publicly issued notice. Absent the use of authority under section 7508A, the Secretary’s inherent discretion in administering and enforcing federal tax laws under section 7803 arguably grants the ability to provide this relief. This type of discretion has never been used to provide relief from statutorily-imposed interest, and granting relief in these circumstances presents significant policy issues.

Hazards

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Please let me know if you have any additional questions.