

Internal Revenue Service  
memorandum

date: MAY 11 1998

to: Director, Office of Penalty Administration CP:EX:ST:P

from: ~~Assistant Chief Counsel (Income Tax & Accounting) CC:DOM:IT&A~~

subject: Assertion of the Negligence Penalty under Section 6662(b)(1) on Underpayment of Excise Taxes

This memorandum responds to your request for assistance regarding whether the negligence penalty under section 6662(b)(1) of the Code can be asserted on excise tax underpayments. Your memorandum explains that the language of section 6662(b)(1) allows for the imposition of the penalty, but §1.6662-3(a) of the Income Tax Regulations restricts the applicability to underpayments of income tax imposed under subtitle A of the Code.

Law and Discussion.

Section 6662(b) of the Code applies the accuracy related penalty to the portion of any underpayment that is attributable to one or more of the following:

- (1) Negligence or disregard of rules or regulations.
- (2) Any substantial understatement of income tax.
- (3) Any substantial valuation misstatement under chapter 1.
- (4) Any substantial overstatement of pension liabilities.
- (5) Any substantial estate or gift tax valuation understatement.

Section 1.6662-3(a) of the regulations provides, in pertinent part, that if any portion of an underpayment of any income tax imposed under subtitle A of the Code is attributable to negligence or disregard of rules or regulations, there is added to the tax an amount equal to 20 percent of such portion.

As the prior review of the law demonstrates, the imposition of the negligence penalty contained in section 6662(b)(1) is not limited to underpayments of income tax. However, that limitation does apply to the substantial understatement penalty contained in section 6662(b)(2). In addition, the other penalties contained in section 6662(b)(3), (4), and (5) are limited to underpayments relating to chapter 1 taxes, pension liabilities, and estate or gift taxes, respectively. The statutory language supports the argument that if Congress had intended to limit the application of the negligence penalty to underpayments of certain types of taxes, it would have done so. See, Cramer v. Commissioner, 64 F.3d 1406, 1412 (9th Cir. 1995) (citing Arizona Elec. Power Co-op., Inc. v. United States, 816 F.2d 1366, 1375 (9th Cir. 1987), where the court explained that it is a fundamental rule of statutory construction that when Congress includes a specific

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term in one section of a statute but omits it in another section of the same Act, it should not be implied where it is excluded.

Even though the statute does not limit the imposition of the negligence penalty to the underpayment of any income tax imposed under subtitle A of the Code, §1.6662-3(a) of the regulations does. However, when a regulation conflicts with the Code, the Code is controlling. See, H. Wetter Manufacturing Company v. United States, 458 F.2d 1033, 1035 (1972), where the Court explained this rule by providing that because Congress has delegated to the Secretary of the Treasury only the power to issue regulations for the enforcement of the revenue laws, and because this power is limited to carrying into effect the will of the Congress as expressed by the statutes, the express words of the Code must control when they conflict with a regulation. The Secretary may not broaden or narrow the specific provisions of the revenue laws.

Conclusion.

Based on the above discussion, we conclude that the negligence penalty contained in section 6662(b)(1) applies to underpayments of excise tax. If Congress had intended to limit the application of the negligence penalty to underpayments of certain types of taxes, it would have so stated. Additionally, even though §1.6662-3(a) limits the application of the negligence penalty to underpayments of any income tax, when a regulation conflicts with the Code, the Code controls.

If you have any questions please contact Beverly A. Baughman at 622-4940.

By Peter Frederick  
Peter Frederick  
Assistant to the Chief, Branch 4