


Internal Revenue Service
memorandum

date: November 2, 2007

to: David L. Fish
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From: 
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subject: Application of IRC § 6652(c)(1)(A) Penalty

SUMMARY

This is in response to your July 27, 2007 memorandum concerning the application of the I.R.C. § 6652(c)(1)(A) penalty.

DISCUSSION

Law

Code

Section 6033 requires all organizations exempt from federal income tax under section 501(a), except those specifically excluded, to file annual information returns. Such a return must state specifically the items of gross income, receipts and disbursements and such other information for the purpose of carrying out the internal revenue laws as the Secretary may by forms or regulations prescribe. Section 6033(b) lists 14 specific items that organizations described in section 501(c)(3) have to report. Some of these items were added by legislation in 1987 and in 1996. Under section 6033(b)(14), organizations that are required to file annual information returns are required to provide "such other information for purposes of carrying out the internal revenue laws as the Secretary may require."

Section 6652 provides for penalties for failure to file certain information returns. Congress enacted what is now section 6652(c)(1)(A) in 1969. The 1969 version provided for a penalty if an organization failed to file a return required under sections 6033, 6034 or

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6043(b). Section 6652(c)(1)(A) was amended in 1987. The 1987 amendment divides section 6652(c)(1)(A) into two parts. Section 6652(c)(1)(A)(i) imposes a penalty for failure to file a return required under section 6033 on the date and in the manner prescribed therefor. Section 6652(c)(1)(A)(ii) imposes a penalty for failure to include any of the information required to be shown on a return filed under section 6033 or to show the correct information.

Revenue Ruling and Prior Legal Advice

GCM 36372 (1975) describes the application of section 6652 to incomplete Forms 990-P or Forms 4848 that are filed before the due date. The GCM stated that if the information that was required and requested but was not submitted was material and thus necessary for the proper administration of the tax laws, any failure to supply such information would subject the taxpayer to the penalty provided in section 6652(d)(1). The GCM relied on two committee reports that state that the committee's intent is that a failure to provide material items of information called for on a return be treated as a failure to file a return. H.R. Rep. No. 93-979, 160-161 (1974) and H.R. Rep. No. 93-807, 162 (1974).

Rev. Rul. 77-162, and GCM 36506 (1975) which considered the revenue ruling, concluded that an exempt organization that, without reasonable cause, files a Form 990 that is incomplete because it omits material information has failed to file a return for purposes of the penalty imposed by section 6652(d)(1) (now section 6652(c)(1)). Both the revenue ruling and the GCM reasoned that the omission of material information would hinder or preclude the Service from being able to perform the duties and responsibilities placed upon it by Congress. GCM 38760 (1981) updates GCM 36506 (1975) with respect to the identification of material information.

All of the above GCMs were prepared prior to the amendment of section 6652(c)(1)(A) in 1987. Counsel recognized the changes caused by the amendment to section 6652(c)(1)(A) in GCM 39861 (September 26, 1991). GCM 39861 addresses the relationship between the penalty under section 6652(c)(1)(A) and the running of the statute of limitations under section 6501(a). GCM 39861 analyzed the distinction between section 6652(c)(1)(A)(i) and section 6652(c)(1)(A)(ii).

GCM 39861 notes that "The amendment to section 6652 'expands the scope of the penalty provisions to apply to cases where a tax exempt organization files an annual information return but, without reasonable cause, fails to furnish on the return any required information, or furnished incorrect information.' H. Rep. No. 495, 100th Cong., 1st Sess. 1015 (1987)."

GCM 39861 discusses the prior requirements for imposing a penalty under section 6652(c)(1)(A) as set out in GCM 36506 and Rev. Rul. 77-162. It then states:

It is our opinion that the amendments to section 6652(d)(1), now section 6652(c)(1)(A), imposes a penalty that is applicable in two different situations. Subsection (i) imposes a penalty for "failure to

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file a return" required in section 6033 on the date and in the manner prescribed therefore and subsection (ii) imposes a penalty for "failure to include any of the information required . . . under section 6033 or to show the correct information."

The penalty under subsection (i) applies where the document filed is so deficient that the submission is not considered to be a return. In this case, the statute of limitations under section 6501(a) does not begin to run. This is the same standard that applied to former section 6652(d). If material information is omitted the submission will not be considered a return.

The penalty under subsection (ii) applies where the return contains all the material information but omits information required to be shown on a return filed under section 6033. As stated in the legislative history, this penalty is to apply in cases where the organization files a return, but without reasonable cause, fails to furnish information required by section 6033, or furnishes incorrect information.

Analysis

This office believes that the legal advice provided in the GCMs described above continues to be a correct description of the law. Specifically, section 6652(c)(1)(A)(i) applies where there is a material omission. Section 6652(c)(1)(A)(ii) applies in all instances where a taxpayer fails to report or fails to show correct information that is required by the Service for the purpose of carrying out the internal revenue laws.

We note that, as discussed in GCM 39861, if the materiality of an item is questioned, the Service will need to be prepared to substantiate why it considers the item to be material. As noted in the prior legal advice, whether an item is material is an administrative rather than a legal question. The materiality depends upon what the Service requires to administer the tax laws. See § 6033(b)(14). We note that while GCM 38760 lists certain items that were considered material in 1981; the Service is not limited to these items. The administration of the tax laws is a dynamic process, and Service requirements may change over time.

Section 6501 imposes limitations on assessment and collection. With numerous exceptions, it states that the amount of any tax shall be assessed within three years after the return was filed and states when a return will be deemed to be filed. See e.g. section 6501(a), (g)(2), (l)(1). Section 6501 is not conditioned on the imposition of penalties or additions to tax. The Service can determine that a return was not filed, and, therefore, the statute of limitations has not expired even where the section 6652(c)(1)(A)(i) penalty was not imposed during the initial processing of the Form. The section 6652(c)(1)(A) penalty

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can be imposed as a result of the examination of a Form where the statute of limitations does not act as a bar.

The Service is not legally compelled to impose the section 6652(c)(1)(A) addition to tax in every instance where it might be applied.

Hazards



If you have any questions, please contact Helen Rogers or James Brokaw at (202) 622-6070.