

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

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SBSE Collection Policy
(Small Business/Self-Employed)

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subject: Separate CDP Notices for Failure-to-file and Failure-to-pay Additions to Tax

This memorandum responds to your request for clarification about when a taxpayer is entitled to a Collection Due Process (“CDP”) notice for additions to tax imposed under I.R.C. § 6651(a)(1) for failure-to-file a required return and I.R.C. § 6651(a)(2) and (a)(3) for failure-to-pay tax owed.

Issue

Whether a taxpayer who has been issued a CDP notice listing a failure-to-file or failure-to-pay addition to tax based on the amount shown on a return is entitled to another CDP notice when a failure-to-file or failure-to-pay addition to tax is imposed based on a deficiency amount for the same tax period as the return.

Conclusion

The assessment of a failure-to-file or failure-to-pay addition to tax based on a deficiency amount is considered under the CDP regulations to be a change to the unpaid tax for the tax period. Accordingly, a taxpayer is entitled to a separate CDP notice for a failure-to-file or failure-to-pay addition to tax based on the deficiency.

Law and Analysis

Section 6320 (lien) and section 6330 (levy) require the Service to provide written notification to the taxpayer of the right to a hearing after the first filing of a Notice of Federal Tax Lien (“NFTL”) and written notification of the right to a hearing before levy (collectively, “CDP notice”) for each tax and period. Treas. Reg. §§ 301.6320-1(b)(2), 301.6330-1(b)(2). The taxpayer is entitled to only one hearing with respect to the tax period(s) listed on the CDP notice - one CDP hearing for the filing of the NFTL and one CDP hearing for the proposed levy. I.R.C. §§ 6320(b)(2), 6330(b)(2). Based on the one-hearing limitation, the regulations generally interpret sections 6320 and 6330 as

permitting the issuance of only one CDP notice per tax and period. Treas. Reg. § 301.6320-1(b)(2) Q&A-B1 (providing that only the CDP notice after the first filing of a NFTL for a tax period entitles a taxpayer to a CDP hearing); Treas. Reg. § 301.6330-1(b)(2) Q&A-B2 (providing that only the first CDP levy hearing notice entitles a taxpayer to a CDP hearing).

The regulations, however, provide that a taxpayer may receive more than one hearing (and notice) under sections 6320 and 6330 with respect to a tax period if the unpaid tax has changed as a result of an additional assessment of tax for that period or an additional assessment of an accuracy-related penalty (section 6662), or filing-delinquency addition to tax (section 6651(a)(1)). Treas. Reg. §§ 301.6320-1(d)(2) Q&A-D1, 301.6330-1(d)(2) Q&A-D1. The regulations further provide that the taxpayer is not entitled to more than one CDP hearing (and notice) if the additional assessment represents either an accrual of interest, or an accrual of additions to tax. Id. Accruals are monthly increases in the addition to tax at a prescribed statutory rate (e.g., 0.5 percent per month).

A taxpayer is entitled to a CDP notice and hearing for each of the two types of failure-to-file additions to tax. I.R.C. § 6651(a)(1). When a return is filed late, the section 6651(a)(1) failure-to-file addition to tax is imposed on the balance due shown on the return. A second addition to tax may be imposed later if a deficiency is determined and assessed with respect to the late-filed return. The section 6651(a)(1) failure-to-file additions to tax are imposed at different times and the means of resolving collection of each addition to tax will differ depending on the taxpayer's circumstances. For this reason, the CDP regulations provide that the taxpayer is entitled to another CDP hearing when there is an additional, non-accrual assessment of an addition to tax. If a CDP notice includes a failure-to-file addition to tax on the balance due shown on the return and then a failure-to-file addition to tax is later imposed based on a deficiency with respect to the return, the taxpayer is entitled to a CDP notice for the addition to tax based on the deficiency.

Although the CDP regulations do not identify the imposition of failure-to-pay additions to tax as a circumstance under which a taxpayer may receive more than one hearing (and notice) for a tax period, the regulations should be interpreted to include these additions to tax. The failure-to-pay additions to tax are sufficiently similar to the failure-to-file additions to tax to be included in the regulations, even though they are not specifically listed therein.

When a taxpayer files a return but does not pay the balance due shown on the return, the section 6651(a)(2) failure-to-pay addition to tax is imposed. A second failure-to-pay addition to tax may be imposed on a deficiency with respect to the return if the taxpayer does not pay after the issuance of a notice and demand for payment to collect the deficiency assessment. I.R.C. § 6651(a)(3). These failure-to-pay additions to tax are imposed at different times and the means of resolving collection of each addition to tax will differ depending on the taxpayer's circumstances. Moreover, a separate reasonable cause defense is available to the taxpayer for each of the failure-to-pay additions to tax.

The taxpayer's reasonable cause defense for failing to pay the amount shown on the filed return may be different from the reasonable cause defense available for the taxpayer's failure to pay the deficiency assessment after notice and demand for payment. For this reason, the CDP regulations provide that the taxpayer is entitled to another CDP hearing when there is an additional, non-accrual assessment of an addition to tax. If a CDP notice includes a section 6651(a)(2) addition to tax and a section 6651(a)(3) addition to tax is later imposed based on the failure-to-pay after notice and demand, the taxpayer is entitled to a CDP notice for the section 6651(a)(3) addition to tax.

The assessment of a failure-to-file or failure-to-pay addition to tax based on a deficiency amount is considered under the CDP regulations to be a change to the unpaid tax for the tax period. Accordingly, a taxpayer is entitled to a separate CDP notice for a failure-to-file or failure-to-pay addition to tax based on the deficiency.