



MANUAL TRANSMITTAL

Department of the Treasury
Internal Revenue Service

4.23.17

APRIL 22, 2022

EFFECTIVE DATE

(04-22-2022)

PURPOSE

- (1) This transmits revised IRM 4.23.17, Employment Tax - Preparer Penalty Procedures for SB/SE Employment Tax.

MATERIAL CHANGES

- (1) IRM 4.23.17.1.3. Added that Chief, Employment Tax Examination, is responsible for ensuring employment tax examiners follow the guidance included in this IRM.
- (2) IRM 4.23.17.1.4. Changed quality review to National Quality and Embedded Quality (EQ / NQ).
- (3) IRM 4.23.17.1.7. Added information about Taxpayer Advocate Service resources and added updated Taxpayer Bill of Rights (TBOR) content.
- (4) Editorial, typographical, and technical changes have been made throughout this section.

EFFECT ON OTHER DOCUMENTS

This material supersedes IRM 4.23.17, dated October 24, 2019.

AUDIENCE

This section contains instructions and guidelines for SB/SE employees when dealing with employment tax return preparer issues.

Wanda R. Griffin
Director, Specialty Examination Policy
Small Business / Self-Employed Division

4.23.17

Preparer Penalty Procedures for SB/SE Employment Tax

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4.23.17.1
(10-24-2019)
Program Scope and Objectives

- (1) **Purpose:** The purpose of this IRM section is to provide procedures for SB/SE examiners for opening preparer penalty cases and assessing preparer penalties for employment tax cases under IRC 6694 and IRC 6695. It also provides procedures for initiating a Program Action Case (PAC).
- (2) **Audience:** This section contains instructions and guidelines for Small Business/Self-Employed (SB/SE) employees dealing with preparer penalty cases and assessing preparer penalties for employment tax examinations.
- (3) **Policy Owner:** Director, Specialty Examination Policy of the Small Business/Self-Employed Division.
- (4) **Program Owner:** Program Manager - Employment Tax Policy. The mission of Employment Tax Policy is to establish effective policies and procedures, to support compliance with employment tax laws.
- (5) **Primary Stakeholders:**
 - Employment Tax – Workload Selection and Delivery (SE:S:DCE:E:HQ:ECS:S:ETEGCS:EWSD)
 - Specialty Examination - Employment Tax (SE:S:DCE:E:SE:ET)
 - Specialty Examination Policy, Employment Tax Policy (SE:S:DCE:E:HQ:SEP:EMTP)
 - Other areas that are affected by these policies and procedures include Appeals, Counsel, SB/SE Examination, LB&I, and TE/GE.

4.23.17.1.1
(10-24-2019)
Background

- (1) The Return Preparer Program (RPP) is an agency-wide effort to increase compliance with professional standards of paid return preparers. Paid tax return preparers are a critical component of tax administration and provide a unique opportunity to impact taxpayer behavior and compliance with tax laws.
- (2) Prior to May 25, 2007, preparer penalties under IRC 6694 and IRC 6695 were not applicable to employment tax returns; they were applicable only to preparers of income tax returns. The Small Business and Work Opportunity Tax Act (SBWOTA) of 2007 amended IRC 6694 and IRC 6695 to include **any** tax return preparer. Preparer penalties became applicable to employment tax returns filed on or after May 25, 2007.
- (3) IRM 20.1.6, Penalty Handbook, Preparer, Promoter, Material Advisor Penalties, provides information regarding the policies and procedures for servicewide preparer, promoter, and material advisor penalties .

4.23.17.1.2
(10-24-2019)
Authority

- (1) Employment tax provisions are found at Internal Revenue Code Subtitle C:
 - Chapter 21, Federal Insurance Contributions Act (FICA),
 - Chapter 22, Railroad Retirement Tax Act (RRTA),
 - Chapter 23, Federal Unemployment Tax Act (FUTA),
 - Chapter 24, Federal Income Tax Withholding (FITW), and
 - Chapter 25, General Provisions relating to employment taxes and collection of income taxes at source.
- (2) The Employment Tax Program is governed by Policy Statements and other internal guidance that apply to all Service personnel regardless of operating division. The Policy Statements found in IRM 1.2.1, Servicewide Policies and

Authorities, Servicewide Policy Statements, apply to all employment tax issues and examinations. Examiners should review these Policy Statements to properly perform their examination duties.

- (3) A website, Search Servicewide Delegation Orders, located at <http://irm.web.irs.gov/imd/del/search.aspx> provides a searchable list of Servicewide Delegation Orders issued by the Commissioner of Internal Revenue, or on his/her behalf by either of the deputy commissioners. Delegation Orders pertaining to each IRS business process can be found in IRM 1.2.2, Servicewide Policies and Authorities, Servicewide Delegations of Authority.
- (4) IRM 4.23 provides Servicewide instructions for all operating divisions with employees involved with the correct filing, reporting, and payment of employment taxes. IRM 4.23 serves as the foundation for consistent administration of employment taxes by various IRS operating divisions. By providing one source of authority for all operating divisions, the Service greatly reduces philosophical and procedural inconsistencies.

4.23.17.1.3
(04-22-2022)
Responsibilities

- (1) Director, Specialty Examination Policy is responsible for the procedures and updates addressed in this IRM.
- (2) Director, Specialty Examination is the executive responsible for examination operational compliance.
- (3) Chief, Employment Tax Examination, is responsible for ensuring employment tax examiners follow the guidance included in the IRM.

4.23.17.1.4
(04-22-2022)
Program Objectives and Reviews

- (1) Program Goals: The processes and procedures provided in this IRM are consistent with the objectives or goals for Employment Tax Examination that are addressed in IRM 1.1.16.3.3.3, Employment Tax Examination, and for Employment Tax Policy that are found in IRM 1.1.16.3.5.2.2, Employment Tax Policy.
- (2) Program Effectiveness: Program goals are measured with Employment Tax National Quality and Embedded Quality (EQ / NQ) Performance Reports that monitor whether quality attributes are applied uniformly and consistently.
- (3) Annual Review: Program Manager - Employment Tax Policy is responsible for reviewing the information in this IRM annually to ensure accuracy and promote consistent tax administration.

4.23.17.1.5
(10-24-2019)
Program Reports

- (1) Program Reports: Information regarding the reporting of program objectives are included on, but not limited to, the following reports submitted to the Director, Examination - Specialty:
 - Headquarters Examination Monthly Briefing,
 - Program Manager Monthly Briefing,
 - Examination Operational Review, and
 - Business Performance Reviews.
- (2) The Quarterly Business Performance Review (BPR) provides updates on the status of Whistleblower claims in Operating Division SME status.

4.23.17.1.6
(04-22-2022)

Acronyms

- (1) The following table lists commonly used acronyms and their definitions:

Acronym	Definition
AIMS	Audit Inventory Management System
BPR	Business Performance Review
CCP	Centralized Case Processing
EFIN	Electronic Filing Identification Number
EIN	Employer Identification Number
ERCS	Examination Returns Control System
ET-WSD	Employment Tax – Workload Selection and Delivery
OPR	Office of Professional Responsibility
PAC	Program Action Case
PSC	Preparer Steering Committee
PTIN	Preparer Tax Identification Number
RPC	Return Preparer Coordinator
RPP	Return Preparer Program
SC	Source Code
SME	Subject Matter Expert
SSN	Social Security Number
SBWOTA	Small Business and Work Opportunity Tax Act of 2007
TAS	Taxpayer Advocate Service
TBOR	Taxpayer Bill of Rights
TPPS–PTIN	Tax Professional PTIN System - PTIN

4.23.17.1.7
(04-22-2022)

Related Resources

- (1) The following table lists the primary sources of guidance:

Source	Title	Description of Guidance
IRM 4.23	Employment Tax IRM	IRM sections owned by SB/SE Specialty Examination Policy. Provides Servicewide instructions for employees of all operating divisions involved with the correct filing, reporting, and payment of employment taxes. IRM 4.23 serves as the foundation for consistent administration of employment taxes by various IRS operating divisions.
IRM 20.1.6	Penalty Handbook - Preparer, Promoter, Material Advisor Penalties	IRM outlines the policy and procedures surrounding return related penalties. For use by any employee needing information related to the applicability or application of one of these penalties.

(2) Other helpful information sources include:

- The SB/SE Knowledge Management home page for Employment Taxes at <https://portal.ds.irsnet.gov/sites/vl014/pages/default.aspx>
- The Specialist Referral System home page at <https://srs.web.irs.gov/>
- A list of SB/SE Employment Tax Policy Analysts, including their contact information and program assignments, is found at *Employment Tax Policy Contact*.
- The web site “Examining an Employment Tax Case” at <https://portal.ds.irsnet.gov/sites/vl014/pages/home.aspx?bookshelf=examining%20an%20employment%20tax%20case>

(3) The Taxpayer Bill of Rights (TBOR) lists rights that already existed in the tax code, putting them in simple language and grouping them into 10 fundamental rights. Employees are responsible for being familiar with and acting in accord with taxpayer rights. See IRC 7803(a)(3), Execution of Duties in Accord with Taxpayer Rights. For additional information about the TBOR, see <https://www.irs.gov/taxpayer-bill-of-rights>.

(4) The Taxpayer Advocate Service (TAS) is an independent organization within the Internal Revenue Service (IRS), led by the National Taxpayer Advocate. Its job is to protect taxpayers’ rights by striving to ensure that every taxpayer is

treated fairly and knows and understands their rights under the TBOR. TAS offers free help to taxpayers, including when taxpayers face financial difficulties due to an IRS problem, when they are unable to resolve tax problems, they haven't been able to resolve on their own, or when they need assistance to address an IRS system, process, or procedure that is not functioning as it should. TAS has at least one taxpayer advocate office located in every state, the District of Columbia, and Puerto Rico.

- (5) Employment tax examiners should consider the disclosure provisions when preparing agreed and unagreed case reports. For further information, see the Privacy, Government Liaison and Disclosure (PGLD) maintained knowledge base at <https://portal.ds.irsnet.gov/sites/VL003/pages/default.aspx> for additional information.

4.23.17.2 (10-24-2019) **Law**

- (1) IRC 6694 provides, in part, for penalties against tax return preparers due to an understatement of a taxpayer's liability by a tax return preparer. IRC 6694(a) imposes a penalty on any tax return preparer who prepares a return or claim for refund with respect to which any part of an understatement of liability is due to an unreasonable position and the preparer knew (or reasonably should have known) of the position. This penalty applies with respect to each return or claim for refund.
- (2) IRC 6694(b) provides for increased penalties where the understatement was due to willful or reckless conduct of the tax return preparer.
- (3) IRC 6695 provides for various other assessable penalties with respect to the preparation of tax returns for other persons. The applicable subsections in IRC 6695:
 - a. Failure to furnish copy to taxpayer
 - b. Failure to sign return
 - c. Failure to furnish identifying number
 - d. Failure to retain copy or list
 - e. Failure to file correct information returns
 - f. Negotiation of check
 - g. Failure to be diligent in determining eligibility for certain tax benefits
 - h. Adjustment for inflation
- (4) IRC 6713, "Disclosure or use of information by preparers of returns", imposes a penalty for each unauthorized disclosure or use of information furnished for, or in connection with, the preparation of an individual income tax return. The penalty may be asserted against a preparer or any person providing services in connection with the preparation of an income tax return. For each unauthorized disclosure or use of return information under IRC 6713, a penalty of \$250 may be asserted. The total amount cannot exceed \$10,000 per person per calendar year.

4.23.17.3 (03-23-2017) **Procedures During Employment Tax Audit**

- (1) The purpose of asserting penalties on return preparers is to increase compliance. When examining a return prepared by a tax return preparer, it is an examiner's responsibility to ensure that the preparer followed all applicable Code provisions. If the provisions were not followed, it is the examiner's responsibility to assert the penalties.

- (2) During all field and office examinations, a determination will be made as to whether the facts and circumstances of the examination give rise to the development of a penalty issue. This determination will be made based on oral testimony and/or written evidence obtained during the examination process. Examiners are required to comment on preparer penalties on all cases examined.
- (3) A preparer penalty case is separate and distinct from the employment tax examination of the preparer's client. A preparer penalty case can be started based on the tax examination of one client or the result of a preparer project.
- (4) Examiners are required to consider preparer penalties on all employment tax examinations. For SB/SE, comments regarding preparer penalties must be recorded on Lead Sheet 300, Penalty Approval Form – Employment Tax Case.

Reminder: A penalty case file still needs to be created; however, it will be created outside of IMS.

4.23.17.3.1
(02-26-2010)

Disclosure Issues

- (1) A preparer penalty case is an individual federal tax matter of the preparer. As with any individual tax matter, an examiner may disclose return information only to that individual, in accordance with IRC 6103(e)(1)(A)(i), or to the preparer's attorney in fact, or duly authorized power of attorney, as permitted by IRC 6103(e)(6).
- (2) Penalty files may include copies of tax returns or portions of tax returns prepared by the preparer who is being considered for the penalty. The penalty files may also include other information taken from examination administrative files, including workpapers and transcripts of taxpayers' accounts whose returns were prepared by the preparer, as well as information received directly from the preparer.
- (3) Information taken from the returns or copies of returns prepared by the preparer, and information from the examination files related to such returns, may be incorporated into the preparer's penalty file. Such information may be disclosed to the preparer or authorized power of attorney if the information relates to the resolution of the penalty issue (IRC 6103(h)(4)). These disclosures may be made by the examiner during the course of the penalty determination or subsequent tax administration activity. An examiner may disclose information about the prepared returns because that information relates to the penalty determination, not because the preparer prepared the return or may have had a power of attorney to represent the taxpayer.
- (4) Other information in the penalty file that does not relate to the penalty determination, such as the taxpayer's current address or current employer, may not be disclosed to the preparer or the preparer's authorized power of attorney. If the file includes information that would seriously impair federal tax administration if disclosed, that information must be withheld by the examiner's manager in accordance with the manager's authority to withhold information in accordance with IRC 6103(e)(7). Delegation Order 11-2, Authority to Permit Disclosure of Tax Information and to Permit Testimony or the Production of Documents, contains the specific delegation of authority. Refer to IRM 1.2.2, Servicewide Policies and Authorities, Servicewide Delegations of Authority.

4.23.17.3.2
(10-24-2019)

**Conclusion of
Employment Tax Case**

- (1) During an examination of the client taxpayer's return, **do not** disclose a preparer penalty decision to the taxpayer or preparer.
- (2) The examination case of the related client should be closed prior to establishing the preparer penalty case.
- (3) The determination of the employment tax examination will proceed without regard to the return preparer penalty issue.

4.23.17.4
(09-13-2013)

**Establishing and
Working a Preparer
Penalty Case**

- (1) SB/SE examiners utilize Lead Sheet 300, Penalty Approval Form – Employment Tax Case, to determine whether or not to proceed with penalties for the tax return under examination (key case). This tax return is the client's return of the tax return preparer. If a decision is made to proceed with a separate return preparer penalty investigation, the examiner must secure the manager's permission on Form 5809, Preparer Penalty Case Control Card.
- (2) Once approved, the examiner will create a preparer penalty case file. If the manager does not approve, the examiner will include a statement to that effect in the Activity Record of the employment tax case.

4.23.17.4.1
(04-22-2022)

**Contact the Return
Preparer Coordinator**

- (1) The Return Preparer Coordinator (RPC) is responsible for handling employment tax return preparer penalty cases. The Employment Tax Policy Analyst for the Return Preparer Program is responsible for RPC duties. A list of SB/SE Employment Tax Policy Analysts, including their contact information and program assignments, is found at: *Employment Tax Policy Contacts*.
- (2) The RPC can advise the examiner if the return preparer is being investigated by Criminal Investigation (CI), the Lead Development Center, or one of the Income Tax Examination Areas. In addition, the RPC can provide invaluable assistance to the examiner at the start of the investigation regarding audit techniques, questions, and direction. The RPC can also provide coordination if more than one investigation is ongoing or contemplated.
- (3) The RPC has direct access to the Preparer section of the Return Preparer Database, which aggregates information about the tax return preparer, including outreach action, address, and counts of individual and business returns, to provide a picture of preparer activity by Social Security Number (SSN) and Preparer Tax Identification Number (PTIN). The Preparer module also contains links to other modules of the database if data is present. The other modules include:
 - Electronic Filing Identification Number (EFIN),
 - Complaint,
 - Tax Professional PTIN System - PTIN (TPPS–PTIN),
 - Criminal Sanction,
 - Civil Injunction,
 - Lead Development Center, and
 - Acceptance Agent.

4.23.17.4.2
(03-23-2017)

**Prepare Form 5809 to
Establish on ERCS – Not
AIMS**

- (1) The examiner establishes controls on the Examination Returns Control System (ERCS) using Form 5809. These cases are not controlled on the Audit Inventory Management System (AIMS). The Form 5809 records:
 - Information concerning the preparer,
 - Information from the client's tax return,
 - Time applied, and
 - Penalty action on the preparer.
- (2) Email a copy of the Form 5809 (Copy B) to the RPC at the start of the penalty investigation.
- (3) There are two different ways of preparing Form 5809 for input on ERCS:
 - a. **Method 1:** Use the return preparer's TIN and name. This is advantageous when one examiner will be conducting a Return Preparer Penalty investigation regardless of the number of penalties that may ultimately be asserted. Rather than create a card for each client penalty investigation, all of the penalty examinations can be condensed into one, and the sum total of hours applied and penalty amounts for each year and penalty type can be input without creating a separate Form 5809 and ERCS record for each client penalty investigation.
 - b. **Method 2:** Use the client's TIN and the name of the return preparer who is the subject of the penalty investigation. A separate Form 5809 and an ERCS record is created for each return preparer penalty investigation. This method is preferred when multiple examiners will each be conducting a separate return preparer penalty investigation on a specific preparer for a particular year. Each examiner charges their time and any penalties assessed are input to the particular client affiliated record created. The disadvantage to creating separate cards arises when there is one examiner conducting the preparer penalty investigation. A separate Form 5809 must be prepared for each penalty and the examination time must be separately input for each period onto ERCS.
- (4) For Method 2, establish a separate ERCS record for each client/year/proposed penalty combination using the following guidelines:
 - a. TIN field: SSN or EIN of the preparer or client
 - b. Name field: Preparer's name
 - c. Tax Period field: Tax period of the client's return
 - d. Statute field: Statute of the client's return – P2 penalties should be assigned an alpha statute of "XX".

Note: The statute of the preparer penalty case will not be the same as the statute of the client's return if the statute of the client's return has been extended.

 - e. Activity Code field: When charging time to the case, use one of the codes in the table below:

Activity Code	Penalty Section	MFT
501	Section 6694(a) penalty	P1
502	Section 6694(b) penalty	P2
504	Section 6695(a) penalty	P4
504	Section 6695(b) penalty	PJ
504	Section 6695(c) penalty	PK
504	Section 6695(d) penalty	PL
504	Section 6695(e) penalty	PM
504	Section 6695(f) penalty	P3
505	Section 7407 injunctions	P5
828	Return Prepared Program	Used for closing the investigation file when the only time charged was for attempting, unsuccessfully, to locate the preparer

4.23.17.4.3 (09-13-2013) Determine Statute

- (1) The statute of limitations on assessment for IRC 6694(a) and IRC 6695 expires three years from the later of the due date of the related (client) return or the date the return was filed. The deemed due date of 4/15 of the subsequent year is used to determine the statute date for all Forms 941 filed in a calendar year. There is no statute of limitations on assessment for IRC 6694(b), IRC 6700, or IRC 6701 penalties.
- (2) There is no statute of limitations on actions to enjoin preparers or promoters under IRC 7407 or IRC 7408.

Note: Extending the statute on a client taxpayer's employment tax return with a *Form SS-10, Consent to Extend the Time to Assess Employment Taxes*, does not extend the statute for the Return Preparer Penalty Case.

- (3) If the statute is less than 180 days and the preparer will agree, the statute on a return preparer penalty case under IRC 6694(a) or IRC 6695 can be extended using Form 872-D, Consent to Extend the Time on Assessment of Tax Return Preparer Penalty (Refer to Rev. Rul. 78-245). The form is sent to the return preparer via Letter 907-P, Return Preparer Penalty Statute Extension Request. If the case has a short statute, the examiner should follow the short statute procedures. See IRM 4.23.14, Employment Tax, Statute Control and Extension, and IRM 4.75.10.6.1, Statute of Limitations.
- (4) A transcript of the return on which the preparer penalty is based should be included in the preparer penalty case file for accurate monitoring of the expiration date. If the preparer does not agree, see IRM 4.23.17.5.6, Quick Assessment Procedures.

4.23.17.4.4
(03-23-2017)

**Contacting the Preparer
and Conducting a
Comprehensive
Interview**

- (1) Each employment tax examination is separate and distinct from the Return Preparer Penalty Case File. Examiners will not propose or discuss preparer penalties in the presence of the taxpayer.
- (2) When initiating a preparer penalty case, examiners should notify the preparer by mailing Letter 4523, Preparer Contact Letter, to the preparer. Allow fourteen calendar days for a response, prior to attempting contact by phone.
- (3) Comprehensive interviews of both the client and preparer are required to develop facts and circumstances in determining if a return preparer penalty case is warranted. At a minimum during the interview, the examiner should ask the taxpayer/client the following basic questions:
 - Did the taxpayer meet with the preparer?
 - Did the taxpayer complete a questionnaire and/or have a face-to-face meeting with the preparer?
 - What documentation was provided to the preparer?
 - Did the taxpayer receive a copy of the return?
 - Was the preparer compensated?
- (4) Ask follow-up questions: while asking basic interview questions is required, critical information may be provided in responses to follow-up questions.
- (5) The questions asked of the preparer are important to determine if additional development regarding the return preparation is warranted. If the preparer is the taxpayer's representative, examiners may want to ask:
 - About the "interview" with the taxpayer.
 - What documentation was provided to prepare the return?
 - Was a copy of the return provided to the taxpayer?
 - Was the preparer aware of any errors, omissions, or mistakes on the return under examination?
 - Was the preparer compensated for the tax return preparation?
- (6) Representatives will often review the return and the taxpayer's records prior to the initial interview. If an error has been made on the return, the preparer will probably know in advance. While the preparer is not required to disclose the error, the extent of the preparer's knowledge should become apparent during the process.
- (7) When interviewing the taxpayer or preparer, ask if other services are provided by the preparer's firm and how long the preparer has been preparing returns for the taxpayer. These questions will help to determine the extent of the preparer's knowledge regarding the taxpayer's financial situation/status. These questions will also alert the examiner as to the potential applicability of penalties. A preparer who has been preparing a client's return for a number of years is more knowledgeable than a preparer who is preparing a client's return for the first time.
- (8) The examiner should contemporaneously document the preparer penalty case file following the conversation with the taxpayer and/or preparer. While each examiner's interview style is different, the documentation of the facts should be consistent and recorded in the case history and on the Employment Tax Reengineering lead sheets and workpapers.

Note: The taxpayer's answers to these inquiries should not be included in any workpapers in the taxpayer's case file. All information regarding the return

preparer's activities and the applicability of any penalties relating to the return preparer should be separated from the taxpayer's case file. This information is then included in the Return Preparer Penalty Case File using a preparer penalty lead sheet.

4.23.17.5
(02-26-2010)
**Return Preparer Case
Disposition**

- (1) The following sections describe the different case closing procedures for a Return Preparer Penalty case.

4.23.17.5.1
(09-13-2013)
No-Change Cases

- (1) The group manager will review the investigation file and document concurrence. The examiner will prepare Letter 1120, No Change - Preparer's Penalty, and mail the original to the preparer as well as include a copy in the case file.
- (2) The examiner will complete Form 5809 and email a copy to the RPC. The group will update ERCS to status code "90" and forward the case, closed "NO CHANGE", to the RPC for review.
- (3) The RPC will extract pertinent information from the file, to be retained for not less than one year. The rest of the no-change case file will not be retained by the examiner.

4.23.17.5.2
(02-26-2010)
**Preparer Penalties
Proposed**

- (1) The preparer should be afforded an opportunity to meet with the group manager to resolve the issues. Document the actions taken on Form 4665, Report Transmittal, if the preparer does not agree.
- (2) If penalties are proposed in conference with the preparer, the examiner provides the preparer with Form 5816, Report of Tax Return Preparer Penalty Case, and Form 886-A, Explanation of Items. When penalties are based on many different prepared returns, attach a list of client names, SSNs/EINs, and tax periods. Use a separate form for each year/return combination.
- (3) If penalties are being proposed via mail, send Letter 1125, Transmittal of Preparer Penalty Report, along with the Form 5816 and Form 886-A. Letter should be issued in **ALL** circumstances which affords the preparer 30-days to respond. Letter 1125 is, in effect, a 30-day letter and should include Pub 5, Your Appeal Rights and How To Prepare a Protest If You Don't Agree, and Pub 594, The IRS Collection Process.

4.23.17.5.3
(09-13-2013)
**Agreed Preparer Penalty
Case**

- (1) For agreed cases, the preparer signs Form 5816. Solicit payment from preparer and if the preparer pays, prepare Form 3244-A, Payment Posting Voucher - Examination.
- (2) Complete Form 8278, Assessment and Abatement of Miscellaneous Penalties. When more than one penalty under different IRC sections will be assessed against the same preparer for the same period, complete a separate Form 8278 for each penalty.
- (3) Prepare Letter 1195 (DO), Acceptance Letter - Agreed Preparer Penalty Case, and a self-addressed envelope. Attach Form 3198, Special Handling Notice for

Examination Case Processing, to each penalty case file. Identify the case as a return preparer penalty case in the "Other" section and reference the applicable IRC section.

- (4) If the preparer filed a joint income tax return, annotate with either "Assess on Primary SSN" or "Assess on Secondary SSN" in the "Other" section to identify the individual against whom the penalty is to be asserted.
- (5) Route the investigation case file to the RPC. Annotate the Form 3198 to indicate that the Letter 1195 (DO) and addressed envelope are enclosed in the file. Complete Form 5809 and include in case file for RPC.
- (6) The group clerk will update the return preparer case on ERCS to status code "41" and use Form 3210, Document Transmittal, to mail the case to the RPC. The group clerk will share all penalty case documents through email or conference call with the RPC for review and discussion. After RPC review and concurrence, the examiner will update ERCS to status code "51" and forward the case to Centralized Case Processing (CCP).

4.23.17.5.4
(03-23-2017)
**Unagreed Case Closing
Procedure**

- (1) The examiner provides the preparer with:
 - Letter 1125, Transmittal of Preparer Penalty Report,
 - Form 5816, Report of Tax Return Preparer Penalty Case, (remove bottom part of the form),
 - Form 886-A, Explanation of Items, or equivalent,
 - Publication 1, Your Rights as a Taxpayer,
 - Publication 5, Your Appeal Rights and How To Prepare a Protest If You Disagree, and
 - Publication 594, The IRS Collection Process.

In addition, the examiner should prepare Form 8278.

Note: Form 8278 is prepared but not provided to the preparer.

- (2) The case then goes into suspense for 30 days, during which time the preparer may agree or protest. If the response is agreed, follow the procedures for an agreed case. If no response is received, follow the procedures for quick assessment at IRM 4.23.17.5.6, Quick Assessment Procedures.

Note: If the client employment tax examination case is unagreed, the unagreed preparer penalty investigation file can not be submitted to Appeals before the employment tax examination case file.

4.23.17.5.5
(03-23-2017)
Protest to the Penalty

- (1) If the preparer submits a pre-assessment protest (written) within 30 days, the investigation file will be reviewed for:
 - a. Adequacy of the protest,
 - b. Development of the issue(s), and
 - c. Managerial involvement.
- (2) The examiner will prepare the assessment document, Form 8278. When more than one penalty under different IRC sections will be assessed against the same preparer for the same period, complete a separate Form 8278 for each penalty.

- (3) Complete Form 5809 and share the case file through email or conference call with the RPC for review. After review and RPC concurrence, the examiner will update ERCS to status code "21" and forward the case to Technical Services to be sent to Appeals via Form 3210.
- (4) An unagreed Return Preparer Penalty Case file cannot be submitted to Appeals for pre-assessment consideration unless 365 days remain on the assessment statute of limitations when received in Appeals. Form 872-D, Consent to Extend the Time on Assessment of Tax Return Preparer Penalty, is used to extend the statute in a preparer penalty investigation. Refer to IRM 4.23.17.4.3, Determine Statute.

4.23.17.5.6 (10-24-2019) Quick Assessment Procedures

- (1) If the preparer refuses to extend the statute and a preparer penalty is proposed, forward the preparer penalty case to CCP for quick assessment.

Reminder: The most common reason for a quick assessment is a short statute.

- (2) Send the preparer Form 5816, Report of Tax Return Preparer Penalty Case, with the bottom part of the report removed along with an explanation of the reason for the quick assessment and a discussion of the preparer's appeals rights.
- (3) Letter 1125, Transmittal of Preparer Penalty Report, is **not** sent to the preparer.
- (4) Forward to the RPC a copy of Form 5816, along with a completed Form 8278 and Form 2859, Request for Quick or Prompt Assessment.
- (5) Annotate Form 3198 with "Quick Assessment" on the "Other" line in the "Expedite" section. The investigation file should be forwarded to the RPC when completed.
- (6) Upon request, the preparer will be provided the same appeal rights post-assessment as would have been provided if the request for Appeals consideration was received before the assessment.
- (7) For additional information on the quick assessment process for return preparers, refer to IRM 20.1.6.21, Statute of Limitations.

4.23.17.6 (02-26-2010) Referral to the Office of the Director of Professional Responsibility

- (1) The Office of Professional Responsibility (OPR) exercises jurisdiction over attorneys, CPA's, enrolled agents, enrolled actuaries, enrolled retirement plan agents, and appraisers. Examiners should exercise discretion in making referrals of specific cases.
- (2) In matters involving non-willful conduct, a referral should only be made when it can be established that the preparer has a pattern of failing to meet the required standards of *TD Circular 230*, Regulations Governing Practice before the Internal Revenue Service. An isolated instance in which a penalty may apply should not, in and of itself, require a referral unless willful conduct is involved. Accordingly, the imposition of penalties under IRC 6694(a) and IRC 6695(a) through (e) should not automatically generate a referral to the director of the OPR. A referral to OPR is mandatory in the event that the preparer is

determined to have violated IRC 6694(b). For a further discussion regarding referral criteria, see IRM 4.11.55.5.2.1, When Ought a Referral Be Made to the OPR?

- (3) When making a referral to OPR, examiners will:
 1. Prepare Form 8484, Suspected Practitioner Misconduct Report for the Office of Professional Responsibility.
 2. Obtain signature approval of their manager on Form 8484.
 3. Send the completed Form 8484 to the RPC for routing to the Director, Office of Professional Responsibility.

4.23.17.7
(03-23-2017)
**Program Action Case
(PAC) for SB/SE
Employment Tax**

- (1) A Program Action Case (PAC) is an investigation where clients of questionable preparers are examined to determine whether preparer penalties and/or injunctive actions are warranted against the preparer(s).
- (2) If, during the course of an employment tax audit, an examiner believes a preparer's noncompliance is pervasive, consideration should be given to opening a PAC. Upon managerial approval, examiners will forward the following information via secure email to the Employment Tax RPC:
 - a. Preparer name,
 - b. Preparer address,
 - c. Preparer EIN, SSN, and/or PTIN, and
 - d. A detailed description of the suspected non-compliance.

4.23.17.7.1
(10-24-2019)
**Employment Tax
Procedures for PAC**

- (1) Employment Tax examiners address noncompliance of return preparers through proposed preparer penalties and referrals to the RPC. Some common examples of noncompliance that should have penalty considerations and a referral to the Area's RPC include:
 - PTIN requirement violations,
 - Egregious errors and/or omissions on client tax returns, and
 - A pattern of noncompliance by the paid return preparer.
- (2) IRM 4.1.10, Planning and Special Programs, Return Preparer Program Coordinator, contains general procedures for conducting a PAC. The following procedures are specific to SB/SE employment tax examiners for making a preparer referral to initiate a PAC:
 1. The RPC will determine whether a PAC is warranted and whether there are any ongoing PACs or investigations currently open on the referred preparer. A separate PAC cannot be opened if there is already an open PAC or investigation. Examiners and/or group managers must not research preparers on their own; all referrals must be routed through the designated RPC.
 2. If there is another open PAC or investigation in SB/SE Examination, Criminal Investigation (CI), LB&I, TE/GE, or other Business Operating Division, the RPC will provide the employment tax referral information to the responsible RPC.
 3. The RPC will prepare an analysis of the preparer's clients' returns to determine if the issue identified by the examiner is prevalent.

4. If the issue is not prevalent or insufficient information is available, the RPC will notify the group manager that a PAC is not warranted. The examiner may submit additional information that will be considered by the RPC.
 5. When appropriate, the RPC will submit a referral package with the necessary research to the Preparer Steering Committee (PSC) for consideration of a PAC. The RPC will notify the group manager that the referral has been forwarded to the PSC for consideration.
 6. The PSC will be comprised of the SB/SE Employment Tax Territory Managers and the RPC. The PSC will meet periodically to review the preparer research and select those they determine warrant a PAC.
 7. The PSC will prepare a PAC Request Memo and submit it to the Policy Program Manager for routing and approval by the Director, Specialty Examination, through the Chief, Employment Tax Examination.
 8. If the PAC is approved, the RPC will notify the group manager and coordinate identification and selection of cases with Employment Tax – Workload Selection and Delivery (ET-WSD) to ensure that the necessary returns are selected for compliance action and assigned a unique tracking code.
- (3) Source Code (SC) “49” is only to be used for the primary return selected as part of the Program Action Case (PAC) client sample originating from ET-WSD. If multi-year cases are developed in ET-WSD for delivery to the groups, only the primary return should reflect SC “49”. The appropriate related return source code should be used on the related returns (i.e., SC “40” for prior/subsequent and SC “44” for non-filers). In addition, Aging Reason Code “49” should be used on all return preparer program returns including the primary and multiple-year returns.

Note: Form 5345-D, Examination Request-ERCS (Examination Returns Control System) Users, is **NOT USED** to establish a preparer penalty case on ERCS.

- (4) Other resources:
- *TD Circular 230*, Regulations Governing Practice before the Internal Revenue Service
 - IRM 4.1.10, Planning and Special Programs, Return Preparer Program Coordinator
 - IRM 4.11.51, Examining Officer’s Guide (EOG), Return Preparer Program
 - IRM 20.1.6, Penalty Handbook, Preparer, Promoter, Material Advisor Penalties
 - Office of Servicewide Penalties maintained Penalties Knowledge Base <https://portal.ds.irsnet.gov/sites/VL015/Pages/default.aspx>

