



DEPARTMENT OF THE TREASURY  
INTERNAL REVENUE SERVICE  
WASHINGTON, D.C. 20224

OFFICE OF  
CHIEF COUNSEL

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SERVICE CENTER ADVICE

MEMORANDUM FOR ASSOCIATE AREA COUNSEL  
(SMALL BUSINESS/SELF EMPLOYED)  
CC:SB:2:PHI:2

FROM: Ashton P. Trice, Senior Technician Reviewer  
(Administrative Provisions & Judicial Practice)  
CC:PA:APJP:B02

SUBJECT: Failure to File and Failure to Pay Penalties for Overseas  
Taxpayers

This responds to your request for Significant Advice dated April 18, 2002, in connection with a question posed by the Philadelphia Service Center.

ISSUE

Whether, in calculating the failure to file and failure to pay penalties under I.R.C. § 6651(a)(1) & (2), respectively, the Internal Revenue Service (Service) should use April 15 or June 15 as the date after which the penalties will accrue for taxpayers who qualify for an automatic two-month extension under Treas. Reg. § 1.6081-5, but file and pay late.

CONCLUSION

The Service should use June 15 as the date after which both failure to file and failure to pay penalties will accrue for taxpayers who qualify for the automatic two-month extension under Treas. Reg. § 1.6081-5, but file and pay late.

FACTS

Taxpayer is a United States citizen living abroad. Taxpayer is a calendar year taxpayer who filed a income tax return after June 15, . Attached to the return was a letter stating that, under the provisions of Treas. Reg. § 1.6081-5, the taxpayer qualified for a two-month extension within which to file a return. The late-filed return showed a balance due, which was remitted with the return.

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Taxpayer failed to provide an explanation for filing the return beyond the extended due date. The Service processed the late-filed return and taxpayer was charged statutory interest. Additionally, taxpayer was assessed a penalty for both failure to timely file and failure to timely pay, pursuant to I.R.C. § 6651(a)(1) and (2), respectively. The penalties were calculated from April 15, the original due date of the return, excluding extensions.

## DISCUSSION

### FAILURE TO FILE

In the event that a taxpayer fails to file a timely return, section 6651(a)(1) imposes an addition to tax of 5 percent of the amount of tax required to be shown on the return for each month (or fraction thereof) during which the failure continues, not to exceed 25 percent in the aggregate. The penalty is reduced by any tax paid on or before the date prescribed for payment.<sup>1</sup> I.R.C. § 6651(b)(1). The penalty extends from the prescribed date for filing the return, which is determined by reference to any extension of time for filing the return. I.R.C. § 6651(a)(1); Mordkin v. Commissioner, T.C. Memo. 1996-187. Thus, the accrual of the failure to file penalty begins immediately after the extended due date for filing the return.

Generally, for calendar year taxpayers, returns are required to be filed on or before April 15 following the close of the taxable year. I.R.C. § 6072. Section 6081, however, provides that the Service may grant a reasonable extension of time for filing a return, not to exceed six months (except that the Service has authority to grant longer extensions to taxpayers who are abroad). I.R.C. § 6081(a). Treas. Reg. § 1.6081-5(a)(5) provides an extension of time for filing returns and paying any tax shown on the return up to and including the fifteenth day of the sixth month following the close of the taxable year for United States citizens or residents whose tax homes and abodes, in a real and substantial sense, are outside the United States and Puerto Rico.<sup>2</sup> For calendar year taxpayers, that date is June 15.

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<sup>1</sup> The date prescribed for payment is generally the filing due date without regard to extensions of time for filing. I.R.C. § 6151(a). Accordingly, Publication 17 provides that, if a taxpayer fails to file by the due date (with extensions), then the failure to file penalty will be calculated on the amount of tax not paid by the due date (without regard to extensions). See Publication 17, page 19, Catalog Number 10311F, revision 2001. We do not believe that this statement contemplates situations in which there has been an extension of the payment due date, as opposed to the filing due date.

<sup>2</sup> This extension applies to returns of income due after April 15, 1988. See Treas. Reg. § 1.6081-5(a).

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To qualify for the extension, the taxpayer must attach a statement to the return stating the reason the taxpayer qualifies for the extension.<sup>3</sup>

In the event that a taxpayer meets the requirements of Treas. Reg. § 1.6081-5(a)(5) and attaches a statement stating the reason he or she qualifies for the extension, the extension would be valid. Thus, the failure to file penalty should be imposed only if the taxpayer fails to file by the extended due date (June 15). If the taxpayer does not file by June 15, the failure to file penalty should be calculated on the basis of each month, or part thereof, after June 15 that the failure continues (up to five months). I.R.C. § 6651(a)(1); Treas. Reg. 1.6081-5(a)(5).

### **FAILURE TO PAY**

If a taxpayer fails to pay the amount shown as tax on any return on or before the date prescribed for payment (determined with regard to extension of time for payment), an addition to tax of .5 percent of the unpaid tax is added for each month or fraction thereof, not to exceed 25 percent. I.R.C. § 6651(a)(2). Generally, payment of tax is due at the time the return for the tax is due to be filed, without regard to any extension of time for filing the return. I.R.C. § 6151(a). In other words, extensions of time for filing do not constitute extensions of time for payment.<sup>4</sup>

In some cases, however, taxpayers may obtain extensions of time for payment. Section 6161(a) provides that the Service may extend the time for payment of tax shown, or required to be shown on any return, for a reasonable period of time, not to exceed six months. Treas. Reg. § 1.6081-5(a)(5), discussed above, provides an automatic extension of time for payment for overseas taxpayers who submit a proper statement attached to their return.

Because section 6651(a)(2) provides that the failure to pay penalty is determined with regard to extensions of time for payment, if a taxpayer complies with the requirement of Treas. Reg. § 1.6081-5(a)(5) and attaches a statement stating the reason the taxpayer qualifies for the extension, the failure to pay penalty should

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<sup>3</sup> While section 6081 generally provides extensions of time to file, Treas. Reg. § 1.6081-5(a) provides for an extension of time to pay as well.

<sup>4</sup> Consistent with this rule is IRM 20.1.2.4.1, which states that the penalty period for the failure to pay penalty is the number of months from the return due date - not including extensions - until the tax is paid in full or the maximum 25 percent is reached. We do not believe that that particular statement in the IRM addresses situations in which the taxpayer has obtained an extension of time to pay (as opposed to an extension of time to file).

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arise only if payment is made after the extended payment due date, i.e., after June 15 for a calendar year taxpayer. I.R.C. § 6651(a)(1). Furthermore, the failure to pay penalty should be calculated on the basis of each month, or part thereof, after June 15 that the failure to pay continues (up to 50 months, when the penalty would reach its maximum amount). I.R.C. § 6651(a)(2).

If you have any questions or need further information, please contact Branch 2 of Administrative Provisions & Judicial Practice at (202) 622-4940.