

Part III

Administrative, Procedural, and Miscellaneous

26 CFR 601.105: Examination of returns and claims for refund, credit, or abatement; determination of correct tax liability.

(Also: Part 1, §§ 6011, 6111, 6662A, 6707, 6707A.)

Rev. Proc. 2007-21

SECTION 1. PURPOSE

This revenue procedure provides guidance to persons against whom a penalty under section 6707 or 6707A of the Internal Revenue Code is assessed, and who may request rescission of all or any portion of that penalty from the Commissioner of the Internal Revenue Service if the penalty is with respect to a reportable transaction other than a listed transaction. This revenue procedure describes the procedures for requesting rescission, including the deadline by which a person must request rescission; the information the person must provide in the rescission request; the factors that weigh in favor of and against granting rescission; where the person must submit the rescission request; and the rules governing requests for additional information from the person requesting rescission.

SECTION 2. BACKGROUND

.01 Section 6011 and the regulations thereunder require a taxpayer that has participated in a reportable transaction to disclose certain information with respect to the reportable transaction with its tax return. Section 1.6011-4(b) of the Income Tax Regulations enumerates and describes the categories of reportable transactions. One category of reportable transactions is a transaction that is the same as, or substantially similar to, one of the types of transactions that the Internal Revenue Service has determined to be a tax avoidance transaction and has identified by notice, regulation, or other form of published guidance as a “listed transaction.” Treas. Reg. § 1.6011-4(b)(2).

.02 The American Jobs Creation Act of 2004, Pub. L. No. 108-357, 118 Stat. 1418 (the Act), was enacted on October 22, 2004. Section 811 of the Act added section 6707A to the Code to provide a monetary penalty for the failure to include on any return or statement any information required to be disclosed under section 6011 with respect to a reportable transaction. Section 6707A(b)(1) provides that the penalty for failure to include information with respect to a reportable transaction, other than a listed transaction, is \$10,000 in the case of a taxpayer that is a natural person, and \$50,000 in any other case. Section 6707A(b)(2) provides that for a listed transaction, the penalty is increased to \$100,000 in the case of a taxpayer that is a natural person, and \$200,000 in any other case.

.03 Section 816 of the Act amended section 6707 to provide for the imposition of a penalty on a material advisor who is required to file a return under section 6111(a)

with respect to any reportable transaction, and who fails to file a timely return or who files a false or incomplete return with respect to the reportable transaction. Section 6707(b)(1) provides that the penalty for failing to file a timely return or filing a false or incomplete return with respect to any reportable transaction other than a listed transaction is \$50,000. Section 6707(b)(2) provides that the penalty with respect to any listed transaction equals the greater of (1) \$200,000, or (2) 50 percent of the gross income derived by the material advisor with respect to aid, assistance, or advice that is provided with respect to the listed transaction before the date the return is filed under section 6111. If the penalty is with respect to a listed transaction and the failure or action subject to the penalty was intentional, the penalty is the greater of (1) \$200,000, or (2) 75 percent of the gross income derived by the material advisor with respect to aid, assistance, or advice that is provided with respect to the listed transaction before the date the return is filed under section 6111.

.04 Section 6707A(d)(1) grants the Commissioner authority to rescind all or a portion of any penalty imposed under section 6707A if (1) the violation relates to a reportable transaction that is not a listed transaction and (2) rescission of the penalty would promote compliance with the requirements of the Code and effective tax administration. Section 6707A(d)(2) provides that the Commissioner's determination whether to rescind the penalty may not be reviewed in any judicial proceeding. The legislative history to section 6707A provides that "the IRS Commissioner or his delegate can rescind (or abate) the penalty." H.R. Conf. Rep. No. 755, 108th Cong., 2d Sess. at 373 (2004). Section 6707(c) provides that the rescission provisions of section 6707A(d)

shall also apply to any penalty imposed on a material advisor under section 6707.

.05 Section 6707A(e) requires a person that is required to file periodic reports under section 13 or 15(d) of the Securities Exchange Act of 1934, or is required to be consolidated with another person for purposes of those reports, to disclose in those reports for the periods specified by the Secretary, the requirement to pay the penalties set forth in section 6707A(e)(2) (i.e., certain penalties under section 6662(h) and penalties under section 6662A(c), section 6707A(b)(2), or section 6707A(e)). If the person fails to disclose the requirement to pay the penalties, then section 6707A(e) requires that the failure be treated as a failure to disclose a listed transaction for which an additional section 6707A penalty applies. Because a penalty imposed under section 6707A(e) is treated as a penalty imposed with respect to a listed transaction, the penalty is not subject to rescission. See Rev. Proc. 2005-51, 2005-33 I.R.B. 296.

.06 Section 812 of the Act, which added section 6662A to the Code, provides that a 20-percent accuracy-related penalty may be imposed on any “reportable transaction understatement,” as defined in section 6662A(b). Section 6662A(c) increases the penalty rate to 30 percent for the portion of any reportable transaction understatement with respect to which the relevant facts affecting the tax treatment of the reportable transaction were not adequately disclosed in accordance with regulations prescribed under section 6011. If the Commissioner (or the Commissioner’s delegate) rescinds the penalty under section 6707A, then the taxpayer is treated as meeting the reportable transaction disclosure requirements of the regulations under section 6011, and the 30-percent penalty rate under section 6662A(c) does not apply. See I.R.C. §

6664(d)(2).

.07 Section 812 of the Act also added section 6664(d) to the Code, which provides a reasonable cause exception to the section 6662A reportable transaction understatement penalty. Generally, this exception cannot apply to any reportable transaction understatement unless, among other things, the relevant facts affecting the tax treatment of the reportable transaction are adequately disclosed in accordance with the regulations prescribed under section 6011. If the Commissioner (or the Commissioner's delegate) rescinds the penalty under section 6707A for failure to include reportable transaction information with a return or statement, then the taxpayer is treated as meeting the reportable transaction disclosure requirements of the regulations under section 6011, and the taxpayer has satisfied that prerequisite to establishing the reasonable cause exception to the reportable transaction understatement penalty under section 6662A. See I.R.C. § 6664(d)(2). Satisfying that one element of section 6664, however, will not alone establish reasonable cause.

.08 Section 903 of the Act amended section 6404(g)(2) to provide an exception to the general rule that interest and certain penalties will be suspended if the Secretary fails to provide a taxpayer with timely notice of an adjustment to the taxpayer's liability. Under section 6404(g)(2)(E), interest and certain penalties will not be suspended with respect to any listed transaction as defined in section 6707A(c). Also, under section 6404(g)(2)(E), interest and certain penalties will not be suspended with respect to any reportable transaction (other than a listed transaction) that the taxpayer did not disclose as required by regulations under section 6011. If the penalty imposed under section

6707A is rescinded under the provisions of section 6707A(d), then the taxpayer is treated as meeting the reportable transaction disclosure requirements of the regulations under section 6011 for purposes of section 6404(g)(2)(E).

.09 Notice 2005-11, 2005-1 C.B. 493, provides that, in determining whether rescission of the penalty under 6707A would promote compliance with the requirements of the Code and effective tax administration, the Commissioner (or the Commissioner's delegate) will take into account all of the relevant facts and circumstances, including: (1) whether the taxpayer has a history of complying with the tax laws; (2) whether the violation results from an unintentional mistake of fact; and (3) whether imposing the penalty would be against equity and good conscience. Further, Notice 2005-11 provides that the Commissioner's determination whether to rescind a penalty in whole or in part is not reviewable by the IRS Office of Appeals or any court. Notice 2005-11 is effective until further guidance is issued in the form of regulations or other guidance that explicitly supersedes Notice 2005-11.

SECTION 3. SCOPE

This revenue procedure applies to any person against whom a penalty under section 6707 or 6707A is assessed and who may also request rescission of all or a portion of the penalty from the Commissioner. A person may only request rescission of a penalty under section 6707 or 6707A if the violation relates to a reportable transaction other than a listed transaction. Further guidance will be issued providing preassessment administrative appeal rights to persons against whom the IRS proposes to assess a penalty under section 6707 or 6707A.

SECTION 4. APPLICATION

.01 When rescission request must be made. In accordance with sections 6707A(d) and 6707(c), a person (i.e., a taxpayer under section 6707A or material advisor under section 6707) requesting rescission of a penalty assessed under either section 6707A or section 6707 must request rescission in writing within 30 days after the date the Service sends notice and demand for payment of the penalty pursuant to section 6303. If the person pays the penalty (not including interest) in full prior to the Service sending notice and demand for payment, the person must request rescission in writing within 30 days from the date of payment. The Service will apply sections 7502 and 7503 to determine whether a request for rescission is timely. A person may request rescission only after filing with the Service the complete return or statement required under section 6011 or 6111, as applicable. Additionally, in order to request rescission, a person must have exhausted the administrative remedies available within the IRS Office of Appeals regarding the proposed assessment of the penalty unless the person has agreed in writing to the assessment of the penalty and has agreed not to file or prosecute a claim for refund or credit of the penalty, administratively or through litigation, other than by requesting rescission. The method of requesting rescission that is provided in this revenue procedure is the exclusive method of requesting rescission. A person may not request rescission through a refund claim, in a collection due process hearing, or through any other avenue for approaching the Service.

.02 Information required in rescission request. The written request for rescission must include: (1) the name, address, telephone number, and Taxpayer

Identification Number, as applicable, of the person against whom the relevant penalty is imposed; (2) the amount of the penalty imposed; (3) a copy of the complete return or statement required under section 6011 or 6111, as applicable, that the person filed with the Service; (4) a copy of the notice and demand for payment or a statement that the person made payment in full prior to receiving notice and demand; (5) a copy of the agreement to the assessment of the penalty and not to file or prosecute a claim for refund or credit of the penalty, if applicable; (6) a statement of the facts and circumstances relating to the violation, which includes the Code section under which the penalty was determined (i.e., section 6707(a) or section 6707A(a)), the reason(s) the original return or statement was not timely filed or was incomplete, a description of the safeguards the person had in place to ensure the proper filing of the return or statement, any remedial measures the person has taken to prevent future violations, and any other facts or circumstances relevant to how rescission would promote compliance with the requirements of the Code and effective tax administration, including the factors listed under section 4.03 of this revenue procedure; (7) a statement of the person's history of compliance with the tax law over the past 10 years, including but not limited to, identification of any penalties that the Service assessed against the person with respect to any reportable transaction and compliance with any requirement to disclose a reportable transaction; (8) for a penalty assessed under section 6707A, copies of all offerings and promotional materials that the taxpayer received with respect to the reportable transaction involved in the rescission request; (9) a statement providing the identity of related parties (as defined in section 267(b)) to

the transaction, the identity of tax exempt entities involved in the transaction, and parties to any designation agreement, if applicable; and (10) the following declaration signed by the person requesting rescission: "Under penalties of perjury, I declare that I have examined this rescission request, and to the best of my knowledge and belief the information in this rescission request is true, correct, and complete."

.03 Information that will expedite the rescission request. Including some or all of the following information in a rescission request will expedite processing of the request: (1) a copy of the notice of proposed assessment (e.g., 30-day letter and Form 4549, Income Tax Examination Changes); (2) the name, telephone number, and address of the IRS revenue agent that examined the person with respect to the applicable penalty; and (3) the name, telephone number, and address of the IRS appeals officer that considered the proposed penalty assessment, if applicable.

.04 Factors that weigh in favor of granting rescission. In determining whether rescission would promote compliance with the requirements of the Code and effective tax administration, the Commissioner (or the Commissioner's delegate) will take into account the following list of factors that weigh in favor of granting rescission. This is not an exclusive list and no single factor will be determinative of whether to grant rescission in any particular case. Rather, the Commissioner (or the Commissioner's delegate) will consider and weigh all relevant factors, regardless of whether the factor is included in this list.

(A) The person, upon becoming aware of its failure to disclose or report a reportable transaction properly, filed a complete and proper, albeit untimely, Form 8886

or 8264 (or any successor forms), as applicable. For a penalty assessed under section 6707A, this factor will weigh strongly in favor of rescission provided that (i) the taxpayer files the Form 8886 prior to the date the Service first contacts the taxpayer (including contacts by the Service with any partnership in which the taxpayer is a partner, any S corporation in which the taxpayer is a shareholder, or any trust in which the taxpayer is a beneficiary) concerning a tax examination for the tax period in which the taxpayer participated in the reportable transaction and (ii) other circumstances suggest that the taxpayer did not delay filing an untimely but properly completed Form 8886 until after the Service had taken steps to identify the taxpayer's participation in the reportable transaction in question. For a penalty assessed under section 6707, this factor will weigh strongly in favor of rescission provided that the material advisor files the form required under section 6111 prior to the earlier of the date that any taxpayer files a Form 8886 identifying the material advisor with respect to the reportable transaction in question or the date the Service contacts the material advisor concerning the reportable transaction.

(B) The failure to properly disclose was due to an unintentional mistake of fact that existed despite the person's reasonable attempts to ascertain the correct facts with respect to the transaction.

(C) The person has an established history of properly disclosing other reportable transactions and complying with other tax laws, including compliance with any requests made under section 6112, if applicable.

(D) The person demonstrates that the failure to include on any return or

statement any information required to be disclosed under section 6011 or section 6111 arose from events beyond the person's control.

(E) The person cooperates with the Service by providing timely information with respect to the transaction at issue that the Commissioner (or the Commissioner's delegate) may request in consideration of the rescission request. In considering whether a person cooperates with the Service, the Commissioner (or the Commissioner's delegate) may take into account whether the person complies with requests for additional information described in section 4.08 of this revenue procedure.

(F) Assessment of the penalty would weigh against equity and good conscience, including whether the person demonstrates that there was reasonable cause for, and the person acted in good faith with respect to, the failure to timely file or to include on any return any information required to be disclosed under section 6011 or section 6111. For a penalty assessed under section 6707A, an important factor in determining reasonable cause and good faith is the extent of the taxpayer's efforts to ensure that persons who prepared the taxpayer's return were informed of the taxpayer's participation in the reportable transactions. For a penalty assessed under section 6707, an important factor in determining reasonable cause and good faith is the extent of the material advisor's efforts to determine whether there was a requirement to file the return required under section 6111. The presence of reasonable cause, however, will not necessarily be determinative of whether to grant rescission.

.05 Absence of factors described in section 4.03 weigh against rescission. The absence of facts establishing the factors described in section 4.03 of this revenue

procedure weigh against granting rescission. The absence of any one of these factors, however, will not necessarily be determinative of whether to grant rescission.

.06 Factors not considered. In determining whether to grant rescission, the Commissioner (or the Commissioner's delegate) will not consider doubt as to liability for, or collectibility of, the penalties. For example, the Commissioner (or the Commissioner's delegate) will not consider whether the taxpayer will suffer "economic hardship," as defined in Treas. Reg. § 301.6343-1(b)(4), if rescission is not granted.

.07 Effect of rescission request on collection. A person need not pay the section 6707 or 6707A penalty assessed prior to requesting rescission. The Service, however, will not suspend collection efforts solely because a person has made a rescission request.

.08 Where rescission request must be submitted. The written request for rescission should be sent to the following address:

Internal Revenue Service
LM:PQA:JC:1953(RR)
Large & Mid-Size Business Division
110 West 44th St., 3rd Floor
New York, NY 10036

The person must send the written request to the above address prior to the date specified in section 4.01 of this revenue procedure.

.09 Request for additional information. After receiving the rescission request, the Service may make a written request seeking additional information and documents relating to the transaction, such as marketing materials and tax opinions, from the person requesting rescission. Requested information must be submitted to the Service

within 30 days of the date of mailing of the request for additional information by the Service. The Service may grant an extension of time for good cause to persons who request additional time within the 30-day period. A person's failure to provide the requested information within the applicable time period may weigh against rescission. Meritless claims of privilege may weigh against rescission. Further, the examining revenue agent and other Service employees involved with the examination may be asked to review and comment on the rescission request.

SECTION 5. PAPERWORK REDUCTION ACT

The collection of information contained in this revenue procedure has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. § 3507) under control number 1545-2047.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

The collection of information in this revenue procedure is in section 4. This information is required to administer the provisions of sections 6707(c) and 6707A(d) and determine whether the Service should rescind penalties otherwise applicable. The likely respondents are taxpayers and material advisors who are subject to a penalty under section 6707 or 6707A.

The estimated total annual reporting or recordkeeping burden is 3865.5 hours.

The estimated annual burden per respondent/recordkeeper varies from 3 to 6 hours, depending on individual circumstances, with an estimated average of 4.5 hours.

The estimated number of respondents or recordkeepers is 859.

The estimated annual frequency of responses (used for reporting requirements only) is 1.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law.

Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. § 6103.

SECTION 6. EFFECTIVE DATE

This revenue procedure is effective for any rescission request that relates to a section 6707 or 6707A penalty for which notice and demand, or payment, is made after October 22, 2004.

SECTION 7. DRAFTING INFORMATION

The principal author of this revenue procedure is Matthew S. Cooper of the Office of the Associate Chief Counsel (Procedure and Administration), Administrative Provisions & Judicial Practice Division. For further information regarding this revenue procedure, contact Matthew S. Cooper at (202) 622-4940 (not a toll free call).